ANTITRUST LAW

Unit 1: The Indianapolis Ready Mix Concrete Price-Fixing Conspiracy

Professor Dale Collins
Georgetown University Law Center
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[1] This map was an exhibit from the follow-on civil case. More defendants were named in the civil case than in the criminal case.

Federal Rules of Evidence: Selected rules

Major Substantive Antitrust Offenses

MAJOR SUBSTANTIVE ANTITRUST OFFENSES

The Sherman Act

Section 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 1]

Section 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. [15 U.S.C. § 2]

The Clayton Act

Section 7. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

[*Remainder of section omitted*]

The Federal Trade Commission Act

Section 5. Unfair methods of competition unlawful; prevention by Commission [1]

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

[*Remainder of section omitted*]

Other Substantive Offenses

Clayton Act § 3: Prohibits certain exclusive dealing and tying arrangements. [15 U.S.C. § 14]

Clayton Act § 8: Prohibits competing corporations above a certain size from sharing common officers or directors. [15 U.S.C. § 19]

Robinson-Patman Act: Prohibits sellers from discriminating in price and promotional assistance between competing buyers in certain cases, and prohibits buyers from knowing inducing or receiving illegal favorable discriminatory prices. [Clayton Act § 2, 15 U.S.C. § 13]

[1] Technically, Section 5 of the FTC Act is not an antitrust law. Section 1 of the Clayton Act defines "antitrust law" to include only the Sherman Act, the Clayton Act, and the import cartel provisions of the Wilson Tariff Act, Act of Aug. 27, 1894, ch. 349, §§ 73-76, 28 Stat. 509, 570, *as amended by* Act of Feb. 12, 1913, ch. 40, 37 Stat. 667 (current version found at 15 U.S.C. §§ 8-11). 15 U.S.C. § 12.

United States v. Beaver

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-1381

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRISTOPHER A. BEAVER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 06 CR 61—**Larry J. McKinney**, *Judge.*

ARGUED OCTOBER 22, 2007—DECIDED FEBRUARY 4, 2008

Before KANNE, EVANS, and WILLIAMS, *Circuit Judges*.

KANNE, *Circuit Judge*. A federal jury found Christopher Beaver guilty of participating in a price-fixing conspiracy, 15 U.S.C. § 1, and making false statements to a federal law enforcement agent who was investigating that conspiracy, 18 U.S.C. § 1001(a)(1). Beaver challenges his convictions on appeal, arguing that the government failed to prove at trial that a price-fixing conspiracy existed, that he joined the conspiracy, or that he made false statements. We affirm.

Editor's note: 18 U.S.C. § 1001(a) provides: "Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years." *See infra* p. 30.

I. HISTORY

In October 2003, Gary Matney, a manager at the Indianapolis office of Prairie Material Ready-Mix Concrete, approached the Federal Bureau of Investigation to report the existence of a price-fixing conspiracy involving several of Prairie Material's competitors. According to Matney, Prairie Material was being pressured to join the conspiracy, a claim that led the FBI to investigate the pricing activities of five ready-made concrete producers in the Indianapolis metropolitan area: (1) Shelby Materials, Inc.; (2) Builder's Concrete & Supply Co., Inc.; (3) Irving Materials, Inc.; (4) Hughey, Inc.; and (5) Ma-Ri-Al, which does business as Beaver Materials Corp. The investigation reached a turning point on May 25, 2004, when FBI agents executed search warrants on the five companies, and interviewed the companies' corporate officers and employees regarding the existence of the conspiracy. Information recovered at that time substantiated many of Matney's claims, and set into motion a chain of events that would mark the demise of the price-fixing scheme. Shelby Materials's Vice-President, Richard Haehl, immediately admitted his criminal conduct and offered to help the government investigate the cartel; the government, in turn, granted Haehl amnesty conditioned on his continued cooperation and, if required, truthful testimony at trial. Shortly thereafter, the government obtained indictments against Builder's Concrete, Irving Materials, and Hughey, Inc., and their respective corporate officers, Gus "Butch" Nuckols, Price Irving, and Scott Hughey. Nuckols, Irving, and Hughey eventually admitted their roles in the conspiracy and entered into plea agreements, in which they, too, offered to help the government investigate the cartel and testify truthfully at trial if called.

Upon enlisting the cooperation of Haehl, Nuckols, Irving, and Hughey, the government sought an indictment

against Beaver Materials and its corporate officers. The government's efforts paid off in April 2006, when a federal grand jury returned a four-count indictment against Beaver Materials, Ricky Beaver—the company's Commercial Sales Manager—and Christopher Beaver—the Operations Manager. Two of the counts were directed at Christopher. First, the indictment charged Christopher with participating in a price-fixing conspiracy in violation of § 1 of the Sherman Antitrust Act. Specifically, the indictment alleged that he met with competitors at "a horse barn owned by Gus B. Nuckols, III a/k/a Butch Nuckols, president of Builder's Concrete and Supply Co.," at which they agreed to increase prices, limit discounts, and implement surcharges; carried out and enforced their agreement; and attempted to conceal the conspiracy. *See* 15 U.S.C. § 1. The indictment also charged Christopher with making false statements regarding his participation in the conspiracy to an FBI agent who investigated it. *See* 18 U.S.C. § 1001(a)(1). Unlike their alleged cohorts, Christopher, Ricky, and Beaver Materials eschewed plea agreements and instead exercised their rights to a jury trial, at which the three were tried jointly.[1] The evidence introduced at trial, which we review in a light most favorable to the government, *see United States v. Andreas*, 216 F.3d 645, 670 (7th Cir. 2000), was as follows:

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[1] Beaver Materials was charged with one count of participating in the price-fixing conspiracy. Like Christopher Beaver, Ricky Beaver was charged with participating in the conspiracy and making false statements to the FBI. Also named in the indictment was John Blatzheim, Executive Vice-President of Builder's Concrete. Blatzheim was likewise charged with participating in the conspiracy and making false statements to the FBI, but rather than go to trial he pled guilty to the charges.

The government presented the testimony of Haehl, Nuckols, Irving, and Hughey, who each provided details as to the origins of the price-fixing conspiracy and Christopher Beaver's role within the scheme. The men explained that, at the turn of the century, the ready-made-concrete market in the Indianapolis area was extremely competitive. The market was primarily occupied by eight concrete producers that often vied for the same customers by bidding on their construction projects. The companies' bidding and pricing processes were largely uniform. At the beginning of construction season in the spring of each year, the producers would send price lists to potential clients to inform them of the lowest possible rates at which they could provide concrete. The price lists usually featured five dollar amounts that went into the calculation of the quoted price. First, there was the base price—or, as it was called, the *gross price*—of the desired amount of a particular mix of concrete. Next, the price list provided the available *discount off the gross price for promptly submitting payment*; the price list then deducted this discount, which yielded the *net price*. But the producers' net prices were identical more often than not, so to distinguish themselves and undercut their competition the producers would include a fourth dollar amount on the price list: an *additional discount from the net price*. The producers would then calculate and quote to potential clients the *resulting discounted net price* as the lowest price at which they could provide the concrete. But as the competition for customers grew over the years, the producers offered increasingly larger net-price discounts that, in turn, depressed the market value of concrete, and, consequently, reduced the producers' overall profits.

The four men each continued that, in July 2000, Nuckols decided that it was time to address the falling market value of concrete. He accordingly organized a meeting

at his horse barn in Fishers, Indiana, of corporate officers of area concrete producers so they could discuss methods of "getting the price up." The meeting was attended by, among others, Haehl, Irving, Hughey, and Beaver Materials's representative, Ricky Beaver. All those present discussed ways in which they could "stabilize the market," leading someone (it is not exactly clear who) to propose a $5.50 limit on each producers' gross-price discount for a cubic yard of concrete; the gross-price-discount limit, in turn, translated to a net-price-discount limit of $3.50 per cubic yard. Although no vote was taken on the proposal, no one in attendance objected to it, nor did anyone refuse to impose the limit; as Haehl described it, "Nobody objected, nobody disagreed, nobody walked away." Indeed, each witness testified that he left the meeting with the firm understanding that an agreement to limit net-price discounts had been reached.

However, each of the four co-conspirators stated, the members of the concrete cartel did not always abide by their agreement. This periodic cheating contributed to the continuing downward spiral of concrete market prices, despite the cartel's efforts. As a result, individual members of the cadre separately met with each other at various times and locations to shore up the plan. But when those meetings failed to raise the price of concrete, Nuckols and Hughey called a second meeting of the entire cartel in May 2002, this time at the Signature Inn in Fishers. Every company participating in the cartel was represented, and, again, Nuckols, Haehl, Irving, Hughey, and Ricky Beaver attended. The purpose of the meeting was, as Haehl described it, "to just reaffirm" the agreement to limit their net-price discounts at $3.50. Just like at the earlier meeting at Nuckols's horse barn, no one objected to imposing the limit. Moreover, those in attendance all agreed to a method of enforcing the limit: if they became aware that another cartel member was offering a

net-price discount greater than $3.50, they would confront that producer about his cheating. And based, in part, on this plan, the meeting at the Signature Inn ended with Haehl, Nuckols, Irving, and Hughey each believing the attendees had reaffirmed the discount limit.

The four witnesses each continued to testify that in the days after the meeting at the Signature Inn, they attempted to enforce the net-price-discount limit by contacting those producers whom they believed were cheating on the cartel agreement. In fact, each man stated that, at one time or another they either confronted someone whom they believed was cheating, or were themselves accused of cheating. Nevertheless, their efforts to police the scheme proved incapable of reversing the downward spiral of concrete prices; as Nuckols testified, in the days following the meeting "our prices just were not doing well and they were going in the gutter." So Nuckols arranged another meeting at his horse barn in October 2003 to discuss the discount limits further. Haehl, Irving, and Hughey again attended, but this time Ricky Beaver did not; as it turned out, Ricky had not accurately conveyed the details of the agreement to the appropriate individuals at Beaver Materials. As Price and Hughey elaborated, Beaver Materials underbid Hughey, Inc., on two separate occasions after the July 2000 meeting, causing Hughey to telephone Christopher Beaver directly and ask him if Beaver Materials was cheating. Christopher, according to Hughey, denied that was the case, and stated that "he was at the discount that was established in the agreement with everyone." But, apparently, Ricky was confused about that discount, leading him to provide Christopher with the wrong information, and, in turn, causing Beaver Materials to quote prices in dereliction of the agreement. Therefore, to avoid the potential for any further confusion, Christopher took over representing Beaver Materials.

The four co-conspirators each further testified that the October 2003 began with Hughey bemoaning the fact that no one was abiding by the agreement, and urging those who did not want to follow the agreement to leave the meeting. Hughey recounted his exhortation: "'You know, guys, this thing is not being adhered to. And we need to decide are we going to agree on this and do what we say we're going to or just walk on out of here.'" But no one walked out. Instead, Hughey's lecture spurred a discussion among all the attendees—including Christopher Beaver—during which they again reassured one another that they each would limit their discounts to $3.50 off of the net price. The discussion did not end there, however. The group also agreed to increase the net price of each cubic yard of performance-mix concrete by $2, and by $2.50 for each cubic yard of bag-mix concrete. They further agreed to add a collective $2-per-cubic-yard surcharge for all concrete produced in the winter. Moreover, those present reasserted their commitment to police the agreement by confronting apparent cheaters.

Just like at the two earlier meetings, Haehl, Nuckols, Irving, and Hughey each stated that they understood that the attendees at the October 2003 meeting agreed to limit their net-price discounts to $3.50, in addition to adopting additional pricing restraints. No one present at the meeting—Christopher Beaver included—objected to the net-price-discount limit. Even more, Hughey testified, Christopher volunteered to contact the manager at American Concrete, another Indianapolis ready-made-concrete producer that was not represented at the meeting, "'and get him the message on what we agreed on.'"

After each of the four co-conspirators testified, the government presented the testimony of several FBI agents who recounted the agency's investigation into the concrete cartel. As relevant here, Special Agent Neil Free-

man testified that when the FBI conducted its searches and interviews on May 25, 2004, he questioned Christopher Beaver regarding the existence of the conspiracy; different FBI agents simultaneously interviewed Ricky Beaver and Allyn Beaver, Christopher's father and company President. During their conversation, Christopher stated that he had been employed by Beaver Materials for 21 years, and that in the "last couple years" he had become more involved in the pricing of the company's products because he would soon be replacing his father as President. When Freeman asked Christopher if he had attended any meetings at Nuckols's horse barn, Christopher answered, "No." Christopher also stated that he did not know of any other employee of Beaver Materials having attended such a meeting. He further told Freeman that he saw Beaver Materials's competitors only when attending meetings of the industry trade group, the Indiana Ready-Mix Association. In all, Freeman stated, Christopher "denied being involved with any kind of discussion of price fixing," and further disavowed ever meeting with any of the competing producers to discuss pricing and discount agreements.

The government rested its case after it presented the evidence regarding the origins of the price-fixing conspiracy, Christopher Beaver's participation, and his statements to Special Agent Freeman. Christopher then moved for a judgment of acquittal on the basis that the government had failed to introduce "any kind of evidence that would indicate that [Christopher] joined the conspiracy." *See* Fed. R. Crim. P. 29(a). After the district court denied the motion, Christopher presented the testimony of his sole witness—Chuck Mosely, who worked at Beaver Materials from 1991 until 2006 as a concrete salesman. Mosely testified that, during his time as a salesman, Christopher never told him how to price concrete. However, Mosely also stated that he knew that

Christopher attended "a price fixing meeting at Butch Nuckols's horse barn."

Beaver Materials, on the other hand, presented the testimony of Allyn Beaver and Charles Sheeks, Beaver Materials's corporate counsel. Allyn testified that Christopher Beaver had some influence over the company's prices, including the authority to authorize certain discounts. Allyn also stated that he was unaware of any price-fixing agreement between Beaver Materials and its competitors, though he did know that Ricky Beaver had been communicating with some of the other area concrete producers. Moreover, Allyn testified that he knew that Christopher had attended the October 2003 meeting at Nuckols's horse barn, that Christopher told him that those in attendance talked about prices, and that "the way that the meeting was going," it seemed like that the attendees "must be doing this all the time." However, Allyn did not know whether Christopher entered into any agreement with Beaver Materials's competitors.

Sheeks then testified that the day after the FBI conducted its interviews, he met with Christopher Beaver, Ricky Beaver, and Allyn Beaver at Beaver Materials's corporate office. There, Christopher and Ricky told Sheeks that they lied to the FBI about their presence at the meetings at Nuckols's horse barn. In response to this news, Sheeks sent a letter to the Department of Justice on May 28, in which he stated only that "[o]ne of the employees of my client made a misstatement to one of your agents to the effect he had not attended a meeting at what has been referred to as 'Butch's barn.' He did, in fact, attend the meeting."

After the defense rested the district court submitted the case to the jury, which found Christopher Beaver guilty on both the price-fixing-conspiracy and false-state-

ments counts.[2] Christopher then renewed his motion for a judgment of acquittal, *see* Fed. R. Crim. P. 29(c), challenging the evidence supporting his price-fixing-conspiracy conviction, but not his conviction for making false statements. After the court denied the motion, it sentenced Christopher to 27 months' imprisonment.

II. ANALYSIS

Christopher Beaver raises two arguments on appeal. First, he argues that the district court erred by denying his motion for a judgment of acquittal because, he asserts, the government failed to prove at trial that a price-fixing conspiracy existed, or that he participated in the conspiracy. Christopher also challenges his false-statements conviction by asserting that the government failed to prove that the lies he told to Special Agent Freeman were material "as a matter of law." We address these arguments in turn.

A. The Existence of, and Christopher Beaver's Participation in, the Price-Fixing Conspiracy

To prevail on his argument that the district court erred by denying his motion for a judgment of acquittal, Christopher Beaver must show that the court incorrectly concluded that there was sufficient evidence to sustain his conviction under the Sherman Antitrust Act. *See* Fed. R. Crim. P. 29(a); *Andreas*, 216 F.3d at 670. Although we review Christopher's argument *de novo*, *see United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002), he faces a "'nearly insurmountable'" burden on appeal, *United States*

[2] The jury also found Beaver Materials and Ricky Beaver guilty on all counts.

v. Jackson, 177 F.3d 628, 630 (7th Cir. 1999) (quoting *United States v. Moore*, 115 F.3d 1348, 1363 (7th Cir. 1997)). Viewing the evidence presented at trial in the light most favorable to the government, we will overturn Christopher's guilty verdict "'only if the record contains no evidence, regardless of how it is weighed,'" from which the jury could have concluded beyond a reasonable doubt that he is guilty. *See Andreas*, 216 F.3d at 670 (quoting *United States v. Agostino*, 132 F.3d 1183, 1192 (7th Cir. 1997)).

Christopher Beaver attempts to shoulder this burden by arguing that the government failed to prove that the concrete producers agreed to restrict their discounts on the net prices of concrete. Specifically, he contends that the evidence at trial showed that "no person voiced their assent to the supposed conspiracy." Thus, according to Christopher, the government failed to establish that the producers entered into an agreement in the first place.[3]

To prove a violation of § 1 of the Sherman Antitrust Act, the government had to introduce evidence showing that the concrete producers conspired to restrain trade, *see* 15 U.S.C. § 1; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 & n.59 (1940); *Andreas*, 216 F.3d at 666; *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270

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[3] Although Christopher argues that the government failed to show that the concrete producers agreed to limit their net-price discounts, he abandons any challenge to the illegality of the agreement itself. *See Crestview Vill. Apartments v. U.S. Dep't of Hous. & Urban Dev.*, 383 F.3d 552, 555 (7th Cir. 2004). This is wise; the net-price-discount limit constituted an illegal price-fixing arrangement, and thus was a *per se* illegal restraint of trade under § 1 of the Sherman Antitrust Act. *See Texaco Inc. v. Dagher,* 547 U.S. 1, 5-7 (2006); *United States v. Kahan & Lessin Co.*, 695 F.2d 1122, 1125 (9th Cir. 1982).

(6th Cir. 1995), by agreeing to fix the price of concrete through limiting their net-price discounts, *see Texaco Inc.*, 547 U.S. at 5-7; *Kahan & Lessin Co.*, 695 F.2d at 1125; *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 185-87 (3d Cir. 1970). Although the existence of such an agreement is "the essence" of the government's § 1 conspiracy allegation, *see United States v. Consol. Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978); *see also Nelson v. Pilkington*, 385 F.3d 350, 356-57 (3d Cir. 2004), the government did not need to show that the producers reached a "formal agreement" to limit their discounts, *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *see also United States v. Whaley*, 830 F.2d 1469, 1474 (7th Cir. 1987). Rather, the government was required only to establish that the concrete producers had "a tacit understanding based upon a long course of conduct" to limit their discounts. *United States v. Beachner Constr. Co.*, 729 F.2d 1278, 1283 (10th Cir. 1984); *see also Andreas*, 216 F.3d at 670; *cf. Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) ("[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980))).

The government introduced ample evidence at trial that showed that the concrete producers shared a "tacit understanding" that they were to limit their net-price discounts collectively. In fact, the trial record is replete with details regarding the cartel's meetings in July 2000, May 2002, and October 2003, at which the producers discussed the net-price-discount limit, policing the limit, and other price restraints. Haehl, Nuckols, Irving, and Hughey each testified that, beginning in July 2000, the entire cartel met on at least three occasions with the

known purpose of addressing the falling price of concrete. During each of those meetings, the competitors discussed the ways in which they could "stabilize the market," leading to the proposed net-price-discount limit. And although no formal vote was taken on the discount limit, no one disagreed with the proposal or stated that he would not participate in the scheme. Indeed, when Hughey gave the producers the opportunity to oppose the price-fixing arrangement and leave the conspiracy, "Nobody objected, nobody disagreed, nobody walked away." Instead, the producers discussed additional methods of aligning their pricing practices, such as instituting general price increases and a winter surcharge. And based on these meetings and related discussions, Haehl, Nuckols, Irving, and Hughey each understood that an agreement was reached. *See Andreas*, 216 F.3d at 670; *Beachner Constr. Co.*, 729 F.2d at 1282.

Moreover, Haehl, Nuckols, Irving, and Hughey each testified that the concrete producers' communications were not limited to the July 2000, May 2002, or October 2003 meetings; they also enforced the discount restraint by confronting those who were cheating on the cartel. Each witness also testified that, on various occasions, they either confronted someone whom they believed was cheating or were themselves accused of cheating. Hughey likewise stated that on two separate occasions Christopher Beaver reassured him that Beaver Materials was abiding by the discount limit. In the face of this evidence, Christopher's assertion that "no person voiced their assent to the supposed conspiracy" rings hollow. Such assent was voiced when the co-conspirators either confronted others about cheating on the cartel, or reassured others—like Christopher did—that they were abiding by the agreement. *See Beachner Constr. Co.*, 729 F.2d at 1282; *cf. In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002) (stating that price-

fixing conspiracy can be proved by "actual, verbalized communication").

Christopher Beaver asserts, however that the concrete producers' occasional cheating on the discount limit shows that no agreement was ever reached. But this argument is illogical; certainly Christopher would agree that a breach of contract does not mean that the parties never entered into the contract in the first place. And the argument is also beside the point because § 1 of the Sherman Antitrust Act does not outlaw only perfect conspiracies to restrain trade. It is not uncommon for members of a price-fixing conspiracy to cheat on one another occasionally, and evidence of cheating certainly does not, by itself, prevent the government from proving a conspiracy. *See, e.g.*, *Andreas*, 216 F.3d at 679 (stating that cheating cartel members did not negate conspiracy); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1231 (8th Cir. 1992) ("Government witnesses testified that although [the defendant] occasionally 'cheated' his co-conspirators by bidding lower than was agreed, he . . . reached mutual understandings with the other participants about prices . . . and usually adhered to the prices and market allocations upon which they agreed."); *United States v. Foley*, 598 F.2d 1323, 1333 (4th Cir. 1979) ("Since the agreement itself, not its performance, is the crime of conspiracy, the partial non-performance of [the defendant company] does not preclude a finding that it joined the conspiracy." (citations omitted)). Thus, we cannot say that the producers' occasional cheating prevented the government from sufficiently proving that they conspired to fix the price of concrete.

Christopher Beaver continues his challenge to the sufficiency of the evidence underlying his price-fixing-conspiracy conviction by arguing that the government failed to show that he personally participated in the cartel.

In Christopher's view, the testimony of Haehl, Nuckols, Irving, and Hughey implicating him in the conspiracy was not credible because "no two competitors said anything as a whole which would corroborate the testimony of the others." But this argument fails from the start. "We will not second-guess the jury's credibility decisions in evaluating [Christopher's] challenge to the sufficiency of the evidence," *United States v. Johnson-Dix*, 54 F.3d 1295, 1306 (7th Cir. 1995); *United States v. Henderson*, 58 F.3d 1145, 1148 (7th Cir. 1995), even if his co-conspirators' claims were uncorroborated, *see United States v. Crowder*, 36 F.3d 691, 696 & n.1 (7th Cir. 1994).

But the credibility of Haehl, Nuckols, Irving, and Hughey aside, their testimony sufficiently implicated Christopher Beaver in the conspiracy. Specifically, each man testified that Christopher (1) was present at the October 2003 meeting at Nuckols's horse barn; (2) participated in discussions on how to limit the price of concrete; (3) did not object to the net-price-discount limit; (4) agreed to confront other conspiracy members if he found them cheating on the agreement; and (5) agreed on additional pricing constraints. Moreover, Hughey testified that, at the meeting, Christopher volunteered to contact the manager at American Concrete "and get him the message on what we agreed on."

Looking beyond the testimony of Haehl, Nuckols, Irving, and Hughey, the uncontradicted evidence regarding Christopher Beaver's responsibilities at Beaver Materials further bolsters the jury's conclusion that he participated the conspiracy. Christopher admitted to Special Agent Freeman that, as Operations Manager, he was involved in the pricing of the company's products, a role that would have allowed the jury to infer that Christopher was able to effectuate the net-price-discount limit. This inference is further supported by Hughey's testimony that he spoke with Christopher personally on two occa-

sions, and that during those conversations Christopher reaffirmed Beaver Materials's commitment to the discount limit. And the testimony of both Mosely and Allyn Beaver failed to contradict the evidence of Christopher's involvement. Both men stated that they knew that Christopher had met with competitors at Nuckols's horse barn in October 2003, and Allyn further stated that Christopher told him that pricing was discussed at that meeting. We thus cannot say that the government failed to prove that Christopher participated in the price-fixing conspiracy, or that the district court erred by denying his motion for a judgment of acquittal. *See Andreas*, 216 F.3d at 670.

B. Christopher Beaver's False Statements

Christopher Beaver next challenges his conviction under 18 U.S.C. § 1001(a)(1) for falsely stating to Special Agent Freeman that neither he, nor Beaver Materials, participated in the price-fixing conspiracy. Specifically, Christopher argues that the government did not prove that his statements were material "as a matter of law." As he explains, the government needed to show at trial that his statements to Freeman were material, *see* 18 U.S.C. § 1001(a)(1); *United States v. Moore*, 446 F.3d 671, 677 (7th Cir. 2006), meaning that the statements had the tendency to influence, or were capable of influencing, the FBI's investigation of the price-fixing conspiracy, *see United States v. Brantley*, 786 F.2d 1322, 1326 (7th Cir. 1986); *United States v. Di Fonzo*, 603 F.2d 1260, 1266 (7th Cir. 1979); *cf. United States v. Fernandez*, 282 F.3d 500, 508 (7th Cir. 2002) (explaining materiality in context of federal

mail-fraud statutes, 18 U.S.C. §§ 1341 and 1346).[4] According to Christopher, his false statements could not have influenced the FBI's investigation because his attorney, Sheeks, contacted the Department of Justice to correct the statements before they could lead the FBI astray.

Before we weigh the merits of Christopher Beaver's argument, however, we must take a moment to alleviate the confusion that apparently exists regarding his challenge. Specifically, Christopher mischaracterizes the issue of his false statements' materiality as "a matter of law." But the materiality of false statements is not a legal determination; it is, rather, a factual determination that is made by the jury only. As the U.S. Supreme Court explained in *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), the Sixth Amendment guarantees a criminal defendant's right to have a jury decide each and every element of the offense with which he is charged, including the element of materiality when the defendant is charged with making false statements. *See also United States v. Ringer*, 300 F.3d 788, 791-92 (7th Cir. 2002); *Waldemer v. United States*, 106 F.3d 729, 730-31 (7th Cir.

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[4] In all, the government was required to prove at trial that (1) Christopher Beaver made a statement, or had a duty to disclose the information; (2) the statement was false, or that Christopher undertook acts amounting to concealment; (3) the statement or concealed facts were material; (4) Christopher made the statement or concealed the facts knowingly and willfully; and (5) the statement or concealed information concerned a matter within the jurisdiction of a federal department or agency. *See* 18 U.S.C. § 1001(a)(1); *Moore*, 446 F.3d at 677. Christopher, however, asserts only that the government failed to establish the materiality of his false statements. Thus, he has abandoned any further challenge to the sufficiency of the evidence underlying his false-statements conviction. *See Crestview Vill. Apartments*, 383 F.3d at 555.

1996); *United States v. Ross*, 77 F.3d 1525, 1538-39 (7th Cir. 1996). Indeed, the jury in Christopher's trial was instructed specifically to determine whether the government proved beyond a reasonable doubt that the false statements he made to Special Agent Freeman were material, and, by virtue of its guilty verdict, concluded that they were. Accordingly, Christopher's argument that the government failed to prove that his false statements were material requires us to examine whether the government introduced sufficient evidence to support the jury's conclusion. *See Moore*, 446 F.3d at 676-80; *United States v. Kosth*, 257 F.3d 712, 718-20 (7th Cir. 2001); *see also Ringer*, 300 F.3d at 791-92.

The government, in turn, contends that Christopher Beaver has "waived" any challenge to the sufficiency of the evidence supporting his false-statements conviction. As the government points out, Christopher did not challenge the evidence showing that he lied to Special Agent Freeman either when he moved for a judgment of acquittal at the close of the government's case, or when he renewed his motion after the jury's verdict; instead, he challenged only the evidence supporting his price-fixing-conspiracy conviction. Thus, the government asserts, Christopher intentionally relinquished the argument that insufficient evidence supported his false-statements conviction by failing to raise it specifically before the district court, and that such a "waiver" precludes our review of this argument.

The government is correct that Christopher Beaver "waived" his sufficiency-of-the-evidence argument regarding his false-statements conviction. *See United States v. Groves*, 470 F.3d 311, 324 (7th Cir. 2006); *United States v. Buchmeier*, 255 F.3d 415, 419 (7th Cir. 2001); *see also* 2A Charles Alan Wright, *Federal Practice & Procedure: Criminal* § 466 (3d. 2000). However, the government

incorrectly asserts that Christopher's failure to raise the point in his motion for a judgment of acquittal prevents us from addressing the argument on appeal; as we have stated many times, we review sufficiency-of-the-evidence arguments that were not presented in a motion for a judgment of acquittal under the plain-error standard. *See, e.g.*, *Groves*, 470 F.3d at 324; *United States v. Allen*, 390 F.3d 944, 947 (7th Cir. 2004); *United States v. Baker*, 40 F.3d 154, 160 (7th Cir. 1994). In this regard, the failure to challenge the sufficiency of the evidence is perhaps more precisely characterized as forfeiture rather than "waiver." *Cf. United States v. Brodie*, 507 F.3d 527, 530-31 (7th Cir. 2007) (differentiating between "waiver" and "forfeiture" in context of Fed. R. Crim. P. 12). *Compare Groves*, 470 F.3d at 324 (stating that sufficiency-of-evidence argument not presented in motion for judgment of acquittal is "waived," but nevertheless reviewed under plain error), *with United States v. Moore*, 425 F.3d 1061, 1069 n.5 (7th Cir. 2005) ("'Waiver precludes appellate review, but forfeiture permits review for plain error.'" (quoting *United States v. Jaimes-Jaimes*, 406 F.3d 845, 847 (7th Cir. 2005))). But regardless of what we call Christopher's failure to raise his challenge before the district court, we nevertheless proceed with a plain-error analysis, *see Groves*, 470 F.3d at 324; *Allen*, 390 F.3d at 947, meaning that Christopher can prevail only if he can show that, "absent reversal, a manifest miscarriage of justice will result," *Allen*, 390 F.3d at 947; *see also United States v. Rock*, 370 F.3d 712, 714 (7th Cir. 2004). Under this "most demanding standard, reversal is warranted only 'if the record is devoid of evidence pointing to guilt, or if the evidence on a key element was so tenuous that a conviction would be shocking.'" *Allen*, 390 F.3d at 948 (quoting *United States v. Taylor*, 226 F.3d 593, 597-98 (7th Cir. 2000)).

Moving (finally) to the merits of Christopher Beaver's argument, we reject his assertion that his false state-

ments were not capable of influencing the FBI's investigation because his attorney, Sheeks, contacted the Department of Justice to correct the statements before the FBI could actually be influenced by them. In fact, the argument fails for several reasons. First, the record does not even support Christopher's contention that he attempted to correct his false statements. The letter Sheeks sent to the Department of Justice did not say that Christopher made false statements to the FBI; the letter merely stated that "one of the employees" of Beaver Materials "misstated" that "he" was not at a meeting at Nuckols's horse barn. This "correction" could be understood as referring to Christopher, Ricky Beaver, Allyn Beaver, or any employee at Beaver Materials that spoke with FBI agents on May 25, 2004, but not as an admission by Christopher, himself, that he misled the FBI. Instead, the letter's vague language perpetuated Christopher's lies by implying that someone else had misled the FBI.

Moreover, Christopher Beaver is incorrect that he can avoid a conviction under § 1001 by correcting his false statements days after he spoke them. Contrary to Christopher's suggestions, § 1001 contains no recantation defense. *See United States v. Sebaggala*, 256 F.3d 59, 64 (1st Cir. 2001). Christopher nevertheless attempts to impute such a defense by citing one case in which a circuit court of appeals held that a criminal defendant can escape prosecution under § 1001 by correcting false statements "almost immediately"—*United States v. Cowden*, 677 F.2d 417, 420 (8th Cir. 1982). But Christopher did not attempt to cure his false statements "almost immediately"; Sheeks did not send the letter on Christopher's behalf to the Department of Justice until three days after Christopher lied to Special Agent Freeman. *Cf. United States v. Salas-Camacho*, 859 F.2d 788, 792 (9th Cir. 1988) (distinguishing *Cowden* and declining to find false statements immaterial when defendant corrected statements only

when confronted by federal agents); *United States v. Fern*, 696 F.2d 1269, 1275 (11th Cir. 1983) (distinguishing *Cowden* and declining to find false statements immaterial when defendant corrected statements only once Internal Revenue Service became suspicious). Christopher's reliance on *Cowden* is thus misplaced, and absent any further support he essentially asks us to interpolate a recantation defense into § 1001. But given Congress's silence on the issue, we decline his invitation to do so. *See Sebaggala*, 256 F.3d at 64 ("[W]e see no basis for writing into section 1001 a recantation defense that Congress chose to omit. After all, 'courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so.'" (quoting *Brogan v. United States*, 522 U.S. 398, 408 (1998))).

Because § 1001 contains no recantation defense, the materiality of Christopher Beaver's false statements must be assessed at the moment he uttered them. *See United States v. Lee*, 359 F.3d 412, 417 (6th Cir. 2004); *United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998) (stating that not measuring materiality of false statement at time of utterance would "allow witnesses who lie under oath to escape prosecution if their statements before a grand jury are obviously false"). And in so assessing the false statements, we conclude that they were material. Special Agent Freeman testified that Christopher denied meeting with any of Beaver Materials's competitors to develop discount limits or pricing constraints. According to Freeman, Christopher went so far as to say that the only time that he saw Beaver Materials's competitors was at Indiana Ready-Mix Association meetings. Because Christopher's statements concealed his actual role in the conspiracy, they could have hindered the FBI's investigation by directing its attention away from the October 2003 meeting at Nuckols's horse barn, away from Beaver Materials as a company involved in the cartel, and away from himself as an individual participant

in the conspiracy. Thus, we see no fault with the jury's determination that Christopher's false statements were material, much less can we say that we are shocked by his conviction. *See Moore*, 446 F.3d at 676-80; *Allen*, 390 F.3d at 948; *Kosth*, 257 F.3d at 718-20.[5]

III. CONCLUSION

We AFFIRM Beaver's price-fixing-conspiracy conviction under 15 U.S.C. § 1, and his false-statements conviction under 18 U.S.C. § 1001(a)(1).

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

[5] Beaver also asks us to grant him "amnesty" to reward the "affirmative steps" he took "to alleviate the harm" caused by his lies. But for the same reasons we will not impute a recantation defense into § 1001, *see Sebaggala*, 256 F.3d at 64, we will not create out of whole cloth an amnesty doctrine applicable to Beaver's wrongdoings, particularly when such a doctrine would essentially reward Beaver's instinct to lie to federal authorities about his role in the price-fixing conspiracy, *cf. Brogan*, 522 U.S. at 408 ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread.").

CRIMES

Criminal Code

18 U.S.C. § 1001. Statements or entries generally (false statements)

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

18 U.S.C. § 3571. Sentence of fine

(a) *In General*. A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) *Fines for Individuals*. Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (d) of this section;
(3) for a felony, not more than $250,000;
(4) for a misdemeanor resulting in death, not more than $250,000;
(5) for a Class A misdemeanor that does not result in death, not more than $100,000;
(6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or
(7) for an infraction, not more than $5,000.

(c) *Fines for Organizations*. Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;
(2) the applicable amount under subsection (d) of this section;
(3) for a felony, not more than $500,000;
(4) for a misdemeanor resulting in death, not more than $500,000;
(5) for a Class A misdemeanor that does not result in death, not more than $200,000;
(6) for a Class B or C misdemeanor that does not result in death, not more than $10,000; and
(7) for an infraction, not more than $10,000.

(d) *Alternative Fine Based on Gain or Loss*. If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(e) *Special Rule for Lower Fine Specified in Substantive Provision*. If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. MICHAEL T. FLYNN, Defendant.	Criminal No.: Violation: 18 U.S.C. § 1001 (False Statements)

INFORMATION

The Special Counsel informs the Court:

Case: 1:17-cr-00232
Assigned To : Judge Contreras, Rudolph
Assign. Date : 11/30/2017
Description: INFORMATION (A)

COUNT ONE

(False Statements)

On or about January 24, 2017, defendant MICHAEL T. FLYNN did willfully and knowingly make materially false, fictitious, and fraudulent statements and representations in a matter within the jurisdiction of the executive branch of the Government of the United States, to wit, the defendant falsely stated and represented to agents of the Federal Bureau of Investigation, in Washington, D.C., that:

(i) On or about December 29, 2016, FLYNN did not ask the Government of Russia's Ambassador to the United States ("Russian Ambassador") to refrain from escalating the situation in response to sanctions that the United States had imposed against Russia that same day; and FLYNN did not recall the Russian Ambassador subsequently telling him that Russia had chosen to moderate its response to those sanctions as a result of his request; and

(ii) On or about December 22, 2016, FLYNN did not ask the Russian Ambassador to delay the vote on or defeat a pending United Nations Security Council resolution; and

that the Russian Ambassador subsequently never described to FLYNN Russia's response to his request.

(Title 18, United States Code, Section 1001(a)(2))

ROBERT S. MUELLER, III
Special Counsel

By: _____

Brandon L. Van Grack
Zainab N. Ahmad
Senior Assistant Special Counsels
The Special Counsel's Office

Figure 1. Defendant Ready-Mixed Concrete Plants in the Central Indiana Area

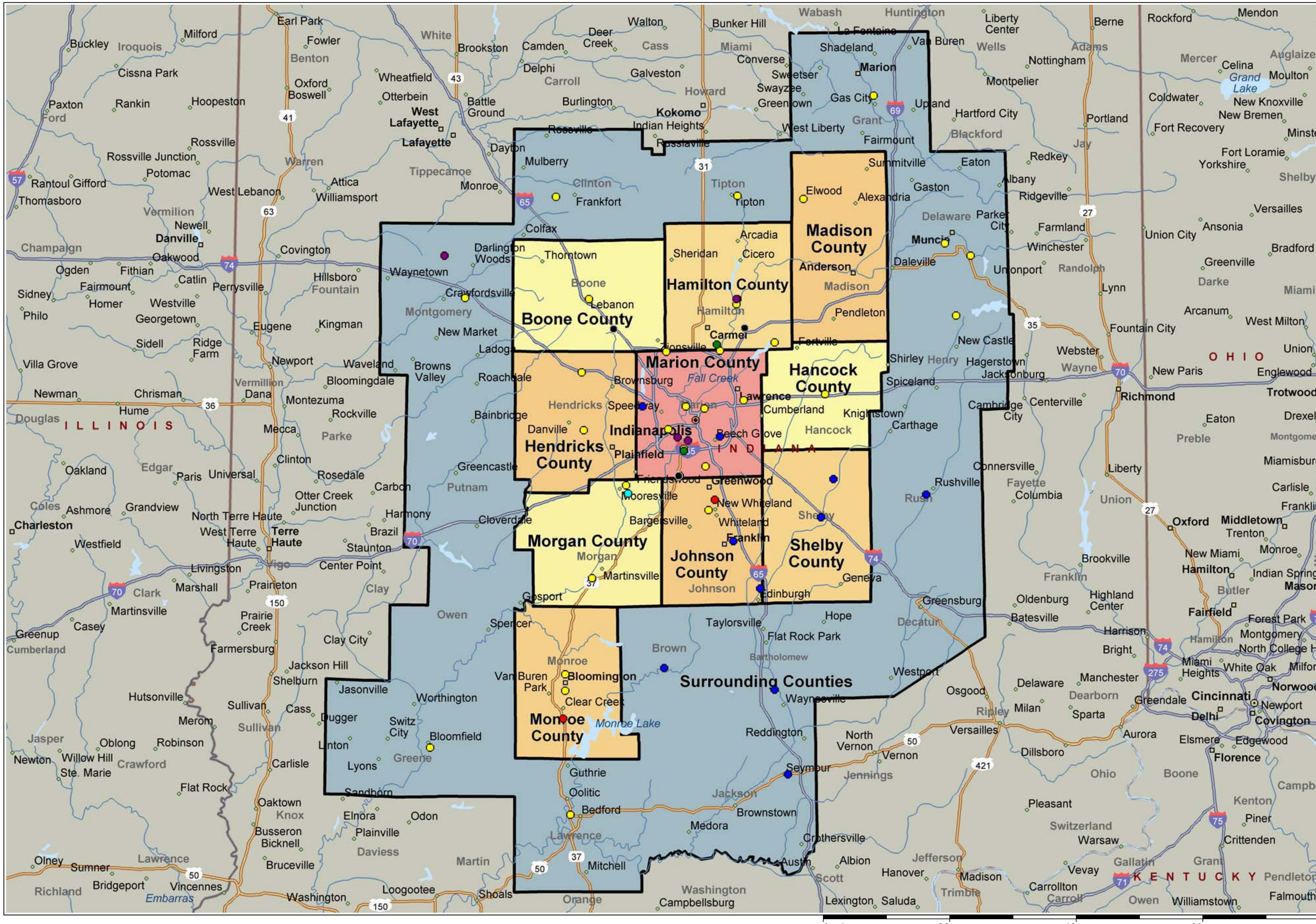
Counties in the Central Indiana Area

- Boone County
- Hamilton County
- Hancock County
- Hendricks County
- Johnson County
- Madison County
- Marion County
- Monroe County
- Morgan County
- Shelby County
- Surrounding Counties

Defendant Locations

- American
- Beaver
- Builders
- Hughey
- IMI
- Prairie
- Shelby

NB: This map was an exhibit from the follow-on civil case. More defendants were named in the civil case than in the criminal case.



CASE STUDY:
READY MIXED CONCRETE

Frank J.Vondrak

Antitrust Division

United States Department of Justice

NB: I have made several changes in format to make this easier to print and read. A copy with the original may be found on the class web site.

THE MARKET

- Ready Mixed Concrete
  - Used in various construction projects, including buildings, sidewalks, driveways, bridges, tunnels and roads
  - Ingredients include cement, aggregate (sand & gravel), water and often other additives
  - Made on demand and, if necessary, shipped to construction site
  - Delivery range limited to 45 minutes from plant

THE MARKET

- Indianapolis, Indiana Metropolitan Area
  - Population over 1 million
  - Rapid growth resulting in a lot of construction

THE MARKET
Competitors

- American Concrete
- Beaver Materials
- Builder's Concrete
- Carmel Concrete
- Irving Materials, Inc.
- Prairie Materials
- Shelby Gravel
- Others

THE CONSPIRACY

Conspirators

- American Concrete
- **Beaver Materials**
- **Builder's Concrete**
- **Carmel Concrete**
- **Irving Materials, Inc.**
- Prairie Materials
- **Shelby Gravel**
- Others

THE CONSPIRACY

- Beginning in July 2000
- Continuing until May 25, 2004
- Conspiracy to fix the price of ready mixed concrete

THE CONSPIRACY

- First Meeting – July 12, 2000
  - The Horse Barn
    - **Beaver**
    - **Builder's**
    - **Carmel**
    - **IMI**
    - **Shelby**
- Agree to Limit Discounts

THE CONSPIRACY

- Second Meeting – May, 2002
  - Hotel Conference Room
    - **Beaver**
    - **Builder's**
    - **Carmel**
    - **IMI**
    - **Shelby**
- Agree to Limit Discounts

THE CONSPIRACY

- Third Meeting – October 22, 2003
  - The Horse Barn
    - **Beaver**
    - **Builder's**
    - **Carmel**
    - **IMI**
    - **Shelby**
- Agree to Limit Discounts, Contact Others

THE INVESTIGATION
November, 2003

- Employee of Prairie contacts DOJ
- Initial concern not related to conspiracy
- During conversation, mentions approaches by competitors
- Agrees to record future conversations with competitors

THE INVESTIGATION
November ’03 – February ’04

- Several conversations recorded
  - President of Carmel Concrete
    - Talks about specific pricing agreements reached
    - Identifies other companies involved
    - Encourages Prairie to go along with agreements

THE INVESTIGATION
May 25, 2004

- FBI executes search warrants
  - American
  - **Beaver**
  - **Builder's**
  - **Carmel**
  - **IMI**
  - **Shelby**

THE INVESTIGATION
May 25, 2004

- FBI & DOJ attorneys conduct drop-in interviews of current and former executives and employees
  - American
  - **Beaver**
  - **Builder's**
  - **Carmel**
  - **IMI**
  - **Shelby**

THE INVESTIGATION
May, 2004

- **Shelby**
  - Applies for conditional amnesty
- **IMI**
  - 2nd in; $29.2 million; 4 execs plead guilty
- **Builder's**
  - 3rd in; $4 million; 2 execs plead guilty
- **Carmel**
  - Last in; $225k fine; pres. pleads guilty

THE INVESTIGATION
May ’04 – April ’06

- **Beaver**

- Denies culpability
- No offer to cooperate
- Company and 2 execs indicted by grand jury April 11, 2006

THE TRIAL
The Charges

- Company and Two Executives
  - Price Fixing – 15 U.S.C. 1
    - July, 2000 through May 25, 2004
    - Ready mixed concrete sold in Indianapolis metro.
- The Two Executives
  - False Statements – 18 U.S.C. 1001
    - Each denied knowledge of or participation in conspiracy when interviewed by FBI on May 25, 2004

THE TRIAL
Our Witnesses

- Coconspirators
  - **Builder's**
  - **Shelby**
  - **IMI**
  - **Carmel**
- FBI Agents
  - Testified about false statements

THE TRIAL
Their Witnesses

- Company's former attorney
- Former salesman
  - Denied knowledge of price fixing
  - Contradicted his May 25, 2004 interview
- Company president
  - Denied authorizing price fixing
  - Admitted knowledge of execs attending meetings
- Local politician

THE TRIAL
The Verdict

- **BEAVER** Price Fixing *Guilty*

- **TWO EXECS** Price Fixing *Guilty*

- **TWO EXECS** False Stmts. *Guilty*

THE TRIAL
The Sentences

- **BEAVER**
  - $1.75 million fine
  - 5 years probation
- **TWO EXECS**
  - 27 months incarceration
  - $5,000 fine

THE RESULTS

- COMPANIES PAY FINES OVER $35 MILLION
  - Includes IMI's fine of $29.2 million
    - Largest single fine ever in domestic antitrust case
- 9 EXECS GET 5 – 27 MONTHS IN PRISON
  - Early cooperators got best deals

AFFIDAVIT IN SUPPORT OF
APPLICATION FOR SEARCH WARRANT

TO BE FILED UNDER SEAL

Your affiant, Steven L. Schlobohm, being first duly sworn, does state that the following is true to the best of his knowledge and belief.

I. AFFIANT

1. I am and have been a Special Agent with the Federal Bureau of Investigation (FBI), United States Department of Justice, for just over 14 years. I have been assigned to the following FBI offices: Minneapolis, Minnesota, Laboratory Division; Washington, D.C.; Springfield, Illinois; and Indianapolis, Indiana (where I have been assigned since November 2001). During my employment with the FBI, I have investigated and supervised investigations of violations of federal criminal law, including complex white collar crime investigations. Since September 2003, I have been assigned to a white collar crime squad and have focused primarily on conducting investigations of allegations of public corruption and antitrust price-fixing and bid-rigging conspiracies.

2. I am the case agent responsible for the ongoing investigation of a price-fixing conspiracy among companies involved in the sale and/or distribution of ready mixed concrete in violation of the Sherman Act (15 U.S.C. § 1). The investigation is being conducted in conjunction with the Antitrust Division of the United States Department of Justice before a grand jury in the Southern District of Indiana.

II. INTRODUCTION

3. This investigation involves a conspiracy among companies involved in the sale and/or distribution of ready mixed concrete to fix the prices at which ready mixed concrete is

sold.

4. The subjects of this investigation sell and/or distribute ready mixed concrete to commercial and government customers in and around Marion County, Indiana. The company addresses and employees listed below are based on information provided by a cooperating witness (CW), information listed in the Indiana Ready Mixed Concrete Association 2003-2004 membership directory, and information based on my personal observations. The subjects include the following companies and individuals:

a. CARMEL CONCRETE PRODUCTS CO. (CARMEL)
12368 Hancock St., Carmel, IN 46032 (Headquarters)
Scott HUGHEY, President

b. IRVING MATERIALS, INC. (IMI)
8032 North State Road 9, Greenfield, IN 46140 (Headquarters)
Fred ("Pete") IRVING, President
Price IRVING, Vice President, Plant Operations
Dan BUTLER, Vice President – Sales

c. BUILDER'S CONCRETE AND SUPPLY CO., INC. (BUILDER'S)
9170 E 131st Street, Fishers, IN 46038 (Headquarters)
Butch NUCKOLS, President

d. SHELBY MATERIALS, INC. (SHELBY)
157 E. Rampart Road, Shelbyville, Indiana 46176 (Headquarters)
Phillip HAEHL, President

e. BEAVER MATERIALS (BEAVER)
16101 River Road, Noblesville, IN 46060 (Headquarters)
Gary BEAVER, Vice President
Chris BEAVER, Director of Operations

f. AMERICAN CONCRETE CO., INC. (AMERICAN)

845 West Troy Avenue, Indianapolis, IN 46225 (Headquarters)

Jason MANN, President

5. I make this Affidavit in support of an application for search warrants for the following locations (each location is more fully described in Section VI. of this Affidavit as well as in **Exhibit A** to each Search Warrant and incorporated by reference herein), each of which I have probable cause to believe contain and conceal documents (more fully described in **Exhibit B** to each Search Warrant and incorporated by reference herein) that constitute evidence of price fixing for the sale of ready mixed concrete and facsimile machines that are instrumentalities of this crime.

a. CARMEL CONCRETE PRODUCTS CO.
12368 Hancock St., Carmel, IN 46032

b. IRVING MATERIALS, INC.
8032 North State Road 9, Greenfield, IN 46140

c. BUILDER'S CONCRETE AND SUPPLY CO., INC.
9170 E 131st Street, Fishers, IN 46038

d. SHELBY MATERIALS, INC.
157 E. Rampart Road, Shelbyville, Indiana 46176

e. BEAVER MATERIALS
16101 River Road, Noblesville, IN 46060

f. AMERICAN CONCRETE CO., INC.
845 West Troy Avenue, Indianapolis, IN 46225

6. I base this affidavit upon my personal knowledge, information provided to me by other agents assigned to the investigation, and my review of written reports.

7. During the course of my investigation I obtained and reviewed documents and

interviewed a pair of witnesses who together have provided extensive information about price fixing in the ready mixed concrete industry and about those who participated in the conspiracy to fix prices for the sale of ready mixed concrete.

8. The investigation has established that probable cause exists to believe that CARMEL, IMI, BUILDER'S, SHELBY, AMERICAN, and BEAVER have secretly agreed to fix prices for the sale of ready mixed concrete in violation of Title 15, United States Code, Section 1. The investigation has also established that probable cause exists to believe that the office(s), secretarial/assistant area(s), computer(s), and document storage area(s) of the individuals named in paragraph 4. above, located at the addresses listed in paragraph 4. above, contain and conceal documents and objects, as noted in paragraph 5. above, that constitute evidence or instrumentalities of the price-fixing conspiracy.

9. This affidavit does not present all evidence developed in the course of the investigation.

III. BACKGROUND

10. The subject of this investigation is a conspiracy to fix the price at which ready mixed concrete is sold in and around Marion County, Indiana. Ready mixed concrete is a product whose ingredients include cement, aggregate (sand and gravel), water, and, at times, other additives. Ready mixed concrete is made on demand and, if necessary, is shipped to worksites by concrete mixer trucks.

11. Ready mixed concrete is purchased by both commercial customers and also local, state, and federal governments for use in various construction projects, including, but not limited to, bridges, tunnels, and roads.

12. Ready mixed concrete is sold to commercial accounts by prices quoted both verbally and from a price sheet and to government accounts pursuant to sealed bids. Bids to government entities typically contain an affidavit which states that the vendor has engaged in no discussions of price with its competitors for the contract (non-collusion affidavit).

13. Ready mixed concrete prices are typically expressed in terms of price per cubic yard. There is a standard discount off of gross price that yields a net price and there is a subsequent discount off of the net price that yields the final price to the customer. It is the fixing of the latter discount – the discount off of the net price of ready mixed concrete – and the raising of the net price that are the subject of the conspiratorial agreements by and among CARMEL, IMI, BUILDER'S, SHELBY, AMERICAN, and BEAVER. Scott HUGHEY, the President of CARMEL, told CW that CARMEL, IMI, BUILDER'S, SHELBY, and BEAVER agreed to fix the discount at $5.50 off of net price and to raise net prices. HUGHEY also told CW that those companies subsequently planned to fix the discount at $3.50 off of net.

14. CARMEL, IMI, BUILDER'S, SHELBY, AMERICAN, and BEAVER are the leading sellers and/or distributors of ready mixed concrete in and around Marion County, Indiana.

15. Based on the information gathered to date, I believe that this price-fixing conspiracy affects sales of ready mixed concrete in and around Marion County, Indiana.

16. In the course of my investigation, I have worked with CW, who has been involved in the ready mixed concrete business for approximately 25 years and is currently serving as an executive with a ready-mixed concrete business in the Indianapolis area. No considerations have been given to, or are expected by, CW in return for his cooperation with the investigation except

that CW has been informed that he will not be subject to prosecution for conduct which he undertakes at the direction of the United States. I have no reason to suspect any bias on the part of CW.

17. The investigation began when CW contacted the Antitrust Division and indicated that he had concerns about a joint venture involving suppliers of stone aggregate in the Indianapolis area. An attorney from the Antitrust Division met with CW shortly after he made his initial complaint. Though at first CW told the attorney that he was concerned about conduct involving a joint venture, CW soon after revealed that his true concern was that companies involved in the sale and/or distribution of ready mixed concrete in the Indianapolis area were conspiring to fix the price at which ready mixed concrete was being sold. CW told the attorney that Scott HUGHEY, the President of CARMEL and a member of the price-fixing conspiracy, had solicited CW to join the conspiracy. The attorney from the Antitrust Division contacted the FBI to assist with further interviews of CW and, subsequently, with consensually monitored conversations between CW and HUGHEY.

IV. EVIDENCE OF PRICE-FIXING CONSPIRACY

18. According to CW, in 2001 Tim KUEBLER, who was a vice president of BUILDER'S at the time, called him and asked if they could meet; KUEBLER did not indicate to CW at that time why he wanted to meet. CW agreed to meet KUEBLER at Frish's Big Boy Restaurant. Prior to his meeting with KUEBLER, Jason MANN, president of AMERICAN, had told CW that KUEBLER was "making the rounds" with the various ready mixed concrete companies trying to get a price increase. During their meeting, KUEBLER began feeling CW out about pricing, particularly with respect to one customer – Carnes. CW had a feeling about

where KUEBLER was going with the conversation and so he cut KUEBLER off. CW told KUEBLER that he knew KUEBLER had been going around to other ready mixed companies trying to get them to fix prices. CW did not agree to anything.

19. In early to mid-2003, HUGHEY contacted CW and asked to meet with him. CW agreed and he met with HUGHEY at the Cracker Barrel located at 3840 Eagleview Drive, Indianapolis, Indiana. According to CW, HUGHEY was trying to get CARMEL, IMI, and CW's company together on pricing. In order to do this, HUGHEY proposed that the three companies agree on setting the price at which they sold ready mixed concrete to F.A. Wilhelm Construction Company (WILHELM). After making the proposal, HUGHEY said, "Let's just start there," which CW understood to mean that HUGHEY was trying to put together a larger group of ready mixed concrete companies for a price increase, but that he was starting by getting those three companies on board. HUGHEY told CW that he was frustrated by an inability to get all of the ready mixed concrete companies together on pricing, so he was trying to establish a smaller group first – CARMEL, IMI, and CW's company – and then expand the pricing agreement to a broader group. CW believes HUGHEY chose WILHELM because CARMEL, IMI, and CW's company all did business with WILHELM and because WILHELM would not contract with SHELBY because it was a non-union operation. CW rejected HUGHEY's proposal. For approximately 4-6 months after the meeting, CARMEL took a more aggressive pricing approach with WILHELM and CARMEL and IMI got most of WILHELM's business; only when CW's company lowered his price to match CARMEL's and IMI's did it start getting more of WILHELM's business again.

20. HUGHEY told CW that there have been meetings among CARMEL, IMI,

BUILDER'S, SHELBY, and BEAVER at which each company agreed to fix the prices at which they sell ready mixed concrete and to approach CW's company to see if CW would agree to join the price-fixing conspiracy. In addition, HUGHEY told CW that Chris BEAVER of BEAVER agreed to talk to Jason MANN, President of AMERICAN, to present the conspiratorial plan and that "there was indication [AMERICAN] would be in on that before we got together and we got together." (See paragraph 23.b.) HUGHEY informed CW that several of the meetings among CARMEL, IMI, BUILDER'S, SHELBY, and BEAVER have taken place in a horse barn on property owned by Butch NUCKOLS, President of BUILDER'S, in Noblesville, Indiana. HUGHEY also told CW that: NUCKOLS and HUGHEY attended those meetings on behalf of BUILDER'S and CARMEL, respectively; Richard and Phillip HAEHL attended on behalf of SHELBY; and that Gary BEAVER attended meetings on behalf of BEAVER. HUGHEY further informed CW that Dan BUTLER represented IMI at one or more of those meetings. CW was uncertain of the names of other representatives who attended these meetings, but was certain from conversations with HUGHEY that representatives of CARMEL, IMI, BUILDER'S, SHELBY, and BEAVER all took part in the price-fixing meetings.

21. According to CW, after he declined HUGHEY's proposal to fix prices for concrete sold to Wilhelm as described in paragraph 19, HUGHEY was persistent in contacting CW and trying to set up more meetings in order to try to persuade him to join the price-fixing conspiracy; CW received a number of telephone calls and messages from HUGHEY following that meeting. Ultimately, CW returned one of those calls and agreed to meet with HUGHEY on November 14, 2003. CW and HUGHEY spoke on November 14 and on several subsequent occasions; during those meetings HUGHEY detailed the price-fixing conspiracy, as detailed in

excerpted transcripts from those meetings in paragraphs 23-25 below.

22. I have monitored a number of telephonic and in-person conversations between CW, who consented to the recording, and HUGHEY. Among the conversations that were recorded were a breakfast meeting on November 14, 2003, a luncheon meeting on November 17, 2003, and a mid-afternoon meeting on February 4, 2004. As discussed in paragraphs 23-25 below, at each of these meetings HUGHEY informed CW of conspiratorial activity and attempted to recruit CW to participate in the conspiracy to fix prices of ready mixed concrete.

23. On November 14, 2003, beginning at approximately 9:00 a.m., HUGHEY and CW met at the Cracker Barrel, 3840 Eagleview Drive, Indianapolis, Indiana. The subparagraphs which follow contain some, but not all, of the discussions that were had at that meeting:

a. HUGHEY: "**But, in the meantime, between your meeting and our last meeting . . . the decision was made as of like the 5th of this month, that we're all going five-fifty** and hope you get a message and if somebody finds yours they'll meet it and try to get with you and let you know that's the program [~~un~~intelligible].

CW: "**You guys have decided to go up five-fifty?**"

HUGHEY: "**No, no to bid at five-fifty off, no more than five-fifty off.**"

CW: "**Well who's -- everybody on board?**"

HUGHEY: "**Well, that's supposed to be us [CARMEL], SHELBY, IMI, BEAVER and the message is supposed to get to AMERICAN.** Now, its been 2 jobs. In fact now [CW], if you guys don't get on, that isn't going to last. And we all know it and pretty much, you know, my meeting today is to say hey are you with us or not, because everybody's, you know, [unintelligible]. And if everybody's at five-fifty and you're not there, it just, it ain't

gonna work, you know. We aren't going to sit there and lie and let it happen and you can understand that, I'm sure."

b. HUGHEY: "The less players you have in a game the less likelihood you have of having a problem. But, on the other hand, like I told you, the problem is just trust and integrity and that sort of thing. If it's five-fifty one morning and then someone calls us up and says "Hey, I got, you know, CARMEL beat your price or IMI or [unintelligible] beat your price," just say, "Hey that's my number." If you know it's there, you know it's there. [Customers have] lied to us, you know they've lied to us. . . . And if you're where you're supposed to be, then there is no negotiating and that's it. And if you got a problem, call the guy and say what happened, and if they're doing what they said, there's no reason to be [unintelligible]. And I can't sit here and look you in the eye, I'm going to tell you [unintelligible] and not tell you something. But I can't look you in the eye and say I can guarantee all these guys are going to do what they say they're going to do – but I think we've all had it up to maybe here and I would hope we will. But everybody's willing to give that a try."

CW: "**So you're saying that SHELBY, BUILDER'S, IMI, BEAVER–**"

HUGHEY: "**AMERICAN and us [CARMEL].**"

CW: "And but you guys haven't talked to AMERICAN?"

HUGHEY: "I haven't but, Chris [BEAVER] was supposed to – "

CW: "Uh"

HUGHEY: "**and there was indication they would be in on that before we got together and we got together. I don't remember when, but everybody was there but AMERICAN** and Chris [BEAVER] was supposed to get with Jason [MANN]. I didn't hear

anything that he did not. But either, either everybody's got to get in it or I mean if you're not willing to, and if you're not, I understand that [CW] and I would hope you would. But if you don't, then here's my concern is that, if we don't, this thing is going to continue to do this and somebody at some point's going to say – I mean, I don't think anybody's dumb enough to wait until the bank comes and gets it all. . . ."

c. CW: **"So you're saying, the agreement is five-fifty–"**

HUGHEY: **"Max[imum]"**

CW: **"is the max discount off of list price?"**

HUGHEY: **"Uh no, off of net price."**

CW: **"Off of"**

HUGHEY: **"So you don't have [unintelligible]"**

CW: **"net price, net price."**

HUGHEY: "And we've been doing that for a long, long time. You know, we bid somebody we don't think we have a chance with we're not out at a low number. And then that way, yeah, I'm not concerned about that. You know if somebody says, 'Hey you guys are all the same,' just say, 'Look, we're bidding the numbers and that's where we're at.' . . ."

d. HUGHEY: "Let me say this – in that meeting, that you weren't there it just came up, we need to do something. Uh, I had told them I tried to get with you and I couldn't get it done, and it was like well we got two really bad decisions to make: one is let it go how it is; and the other bad decision is let's get the price and say we're going do something and go for awhile and hope they get the message – maybe you get to talk with [CW] and then we'll all go in front - in the back of our mind well this isn't going to do it very long. They're not going to let [CW]

[unintelligible]. But I know everybody's thinking it and I said it to a couple of them after the meeting."

CW: "But what do you mean? Like uh, because I see like on this water treatment bid the other day, IMI and BUILDER'S are eleven dollars off. I heard that from two sources, two pretty reliable sources. And so, I'm thinking, what are these guys trying to do? Teach me a lesson where the bottom is? I mean is that the direction these guys are trying to go?"

HUGHEY: "That's disheartening if that's true, because we talked about that. Here we are, since the fifth we've been doing the number thing and we're all [unintelligible] here's fifteen thousand yards, what are we gonna do, what are we gonna do? And we decided what we were going to do is, we were gonna hold the number "

CW: "**So you guys are already bidding five-fifty?**"

HUGHEY: "**Yeah, unless we find your number and then we'll meet it** and we're not taking it down. Now, I'm just telling you how it went on our end of it. . . ."

e. CW: "If I don't agree to go along with it, I mean what's the, what do I have to look forward to here? You know, a big gang-bang at my expense? I mean – "

HUGHEY: "If you don't go along with it?"

CW: "Yeah, if I don't go along with it. I mean you know, I mean I can see, you know—some guys going after my customers, and some things like that to try to – "

HUGHEY: "There's no plan like that or any – here's the way I see it. If you don't go along with it, it's like we all been talking, it's as stupid, and dumb, and going down hill as it has been."

CW: "Right."

HUGHEY: "And I think everybody's had enough of it but we all got to be there if that's gonna work and we gotta do what we say we're gonna do and we got to, we got to put some integrity back in. . . ."

f. HUGHEY: "The other thing – two other things I want to say is that one, IMI is coming out with an increase April first, two bucks, and there's a differential in bag content, versus – it's April, we got time. I'm just telling you that's what they're doing. And the differential between bag and performance is probably going up a little because that's got out of whack over time and probably something on lightweight – don't know what that is yet. And then, the other plan was December fifteenth we go to three-fifty off.

CW: "So you're five-fifty off now, and you want to go to three-fifty, December fifteenth?"

HUGHEY: "Yeah, we started this on the fifth of November. But can I get with you, Monday?"

CW: "Yeah."

24. On November 17, 2003, beginning at approximately 2:00 p.m., HUGHEY and CW met at the Cracker Barrel, 3840 Eagleview Drive, Indianapolis, Indiana. The subparagraphs which follow contain some, but not all, of the discussions that were had at that meeting:

a. HUGHEY: "So, it's real simple. It can work if everybody wants it to work, if it doesn't, it's just a gain for a period of time and then we'll get real stupid."

b. CW: "But I also understand that, you know, I mean, if it's me against everybody else, it can kinda go against me."

HUGHEY: "Well I would hope you wouldn't interpret what's been going on

as, you against everybody else."

CW: "Well, I'm just saying, if, if I'm the only one not agreeing to do something like this and um, everybody else is on board to do it, I mean, I would, well, exactly why I think the contact was made with [my boss]. I mean, I mean he admitted that, right? I mean – "

HUGHEY: "Yeah."

CW: "So that's what I'm saying."

HUGHEY: "**But, but what you've said about everybody's on board but you at this point, that is a fact. It's a point of fact, I can't help that.** But if, that's why I want to, and I understand—you know—this has worked before you saying what you just said, and I understand why you feel that way."

c. HUGHEY: "You know the schedule, and I'd, I'd like everybody to keep on it. And if you're gonna look and see what's out there and kinda try to follow what's there, then I understand. But if you're telling me, 'uhhhhh, I'll be close, but,' don't . . ."

d. CW: "Well, I gotta run Scott. Um, I'll um, you know, I'll just keep an eye on what's going on and um, you know um, you know, see what happens."

HUGHEY: "One last thing is, um, Butch [NUCKOLS], he just said, you know, he would forget the whole deal if you want to move him over here now. But he'd just like to talk to you [unintelligible] for Jon [Miller]."

25. On February 4, 2004, beginning at approximately 2:30 p.m., HUGHEY and CW met at Mountain Jack's Restaurant, located at 6901 W. 38th Street, Indianapolis, Indiana. The subparagraphs which follow contain some, but not all, of the discussions that were had at that meeting:

a. HUGHEY: "I just kinda got down to, it's too soon, we're gonna come out with a price increase, let's wait until January. So now, that's all priced there. Strategic planning meeting or or something the other day where I see [unintelligible] the parking lot. I said, 'Hey, when are we gonna do this?" and just kinda chuckled. He said, 'Well, I think – let's get this out first, and you know just, just – "

CW: "Get what out first?"

HUGHEY: "**The price increase. Which they supposed to been out the end of last week. Ours is gonna go out the end of, ours is gonna go out next Friday,** and it's two dollars on performance, two-fifty a bag, and two dollars for chloride. High range water reducer is, uh, I mean the light-weight stuff I think they're twenty-one dollars, and I don't remember what it is with a high range water reducer. But ours was like nineteen-fifty, and we're gonna raise ours up that – "

CW: "Uh, well I'm sure I'll see something, uh – "

HUGHEY: "**Bill sent me, uh, Richard [HAEHL] sent a thing about we're increasing two dollars here, two fifty here, that kind of increase, not a price sheet. And BUILDER'S is coming out sometime soon – April first.**"

CW: "Well, what'd everybody else think about HAEHLs?"

HUGHEY: "Uh, I don't know. I didn't talk to anybody. You know, that's what the cement people do; that's what they all wanted to do, and I said, we need to get some of this other stuff up and, uh, really, most people, a lot of people, don't pay much attention to that. They'll put [unintelligible] stuff at the bottom–"

CW: "Right."

HUGHEY: "chlorides – a buck and a half, two bucks – and that was Richard [HAEHL]'s point. High early this and that, and I said probably not Richard but if you get out and we're all trying to be on a level playing field, and yours is different then somebody uses that and that gets twisted into something else, and then that guy isn't doing what he was supposed to do, screw it. I'm not doing it, and we're all kind of sensitive to that, you know. He said yeah, he says well, he says, you know, we'll send that letter, we can, you know, we'll bid and stuff, we can do what we want on it when we bid it. I said yeah, you know where it is."

CW: "So what, they're just waiting to get the price increase letters out and–"

HUGHEY: "then go with something else, yeah. Then, then I don't know–"

CW: "Then work off that, I'm–"

HUGHEY: "Well, oh well, well its April first, right now it's just five-fifty off at the max. I got a call, I don't know, before, what is it, Westfield School or something from, uh, IMI that [unintelligible] was at something less than that and **we're gonna go there, that's kinda our agreement** – if something comes up, we're gonna do it, so we did too–"

b. HUGHEY: "Yeah, I think it was another sixty-three, eighty-five, is a dollar. I don't know what the numbers were, [CW] but, uh, I don't know, we just, we just, all need to get there, this is crazy."

CW: "Well, I was just kind of, you know, I, I hadn't heard from you for a while, I was just curious. It sounded like, you know, **I didn't know if there was a meeting at the horse barn again and everybody got–**"

HUGHEY: "No. Hey, and when we do, I, I know you may be a little sensitive about you're not there and you get talked about all–"

CW: "I don't care."

HUGHEY: "that's–"

CW: "I don't care."

HUGHEY: "that's, it isn't happening other than I mean if someone's pointing a finger point it whoever they're pointing it at, but no there hasn't–"

CW: **"I'd rather be on the outside."**

HUGHEY: **"I understand. I'm not real comfortable with that either, and uh, people, you just don't want to get too easy, too bold, too lackadaisical about that stuff**, and, uh, and that that was like last Friday, or a week ago Thursday, think it was last Thursday was the strategic planning thing, and that's when [unintelligible] said, hey, I said I got some paperwork, no I said something on my way out. I said, 'Hey, when we gonna re-visit this three-fifty thing?" I said, 'Well cuz I just wanted to give you this, and I think we ought to get this out first and see how it goes.' So maybe they're thinking, uh, I don't know, March first or something, I mean we're already into February."

CW: **"So who all has a price increase out?"**

HUGHEY: **"Uh, I think, I think that SHELBY is the only one and IMI's is out. I haven't seen it he gave me the – "**

CW: **"So, when he said we are gonna try this, did he mean SHELBY and IMI or just we as in IMI?"**

HUGHEY: **"IMI handed – everybody's gonna go up two dollars or almost two-fifty on bags** and some of those miscellaneous things – calcium's going to two bucks – everything else pretty much the same. Uh, lightweights twenty-one, I don't remember what it is

with the high range water reducer but that's where we're gonna be. And I told them, I said, 'I want to know where that is cause I want to be with it when it comes out.' He handed me a copy last Thursday, I think it was, and that's when he said, 'Well, I think we want to see how this goes first' and thinking, why you want to see how it goes, I mean it goes? If you put it out there and everybody's there, it should go, but, I mean I didn't say that but – and he said 'Let's get this increase out first and then we'll see how it goes from there.' So, I haven't brought it up again with anybody. I've been chasing other things frankly for a couple of weeks and, uh, and I think they said that they, theirs would have been out by last Friday, and I don't know if that's in someone's hands or in the mail. And ours is going to be in the mail by next Friday – Thursday or Friday. I assume you're gonna follow suit. I don't know that you've ever said that, but – "

CW: "Um, yeah, I don't know why not. I mean, I guess, you know, I'm gonna take a look at what all it involves and, um, sounds like it's a little more than just two and two-fifty if you're going up on a lot of the miscellaneous items."

HUGHEY: "Well, it just, it's, uh, I think we were at a buck-fifty on calcium, they were at a buck, seventy-five. They went to two dollars. And I think that's the only change."

c. CW: "We'll see what happens. But, well, I guess you know, I'll wait and see what I get in the mail, and take a look at it. **And so April first is what you guys are all shooting for?**"

HUGHEY: "**Yeah. April first – two dollars and two-fifty on bags, and two dollars on calcium.** And I don't know where you were on light-weight, but we were like nineteen, nineteen-fifty, they're at twenty-one dollars; you, you probably get a copy of it. I can send you one if you want me to."

CW: "Yeah, I don't, I don't, I think we're about nineteen-fifty on light-weight, right now."

26. HUGHEY contacted CW by telephone on March 12, 2004 and asked CW if he was going to go along with the scheduled price increase. Pursuant to instructions from the FBI, CW told HUGHEY that CW's company was going to go along with the price increase. CW subsequently distributed a letter dated March 30, 2004 and a price list with an effective date of April 15, 2004, in which CW was indicating that CW's company was increasing its prices for ready mixed concrete in conformity with the price-fixing agreement.

27. CW has told me that he has observed in the marketplace and that salespeople at his company have told him that SHELBY, IMI, BUILDER'S, BEAVER, AMERICAN, and CARMEL have been pricing ready mixed concrete in conformity with the agreed-upon increase in net prices and the $5.50 discount off of net. CW recognized that there have been a few occasions in which companies involved in the price-fixing conspiracy have sold ready mixed concrete on terms different than those that had been agreed to, but that such instances are rare.

28. CW has provided me with price lists from CARMEL and IMI, as well as price increase announcements from SHELBY, evidencing those companies' ready mixed concrete pricing policies, which, according to CW, reflect the agreed-upon increase in net prices.

a. CW received a CARMEL price list directly from CARMEL; it was faxed from a facsimile machine at CARMEL's offices – as evidenced by the transmission information contained in the facsimile header – and received by a facsimile machine at the offices of CW's company. The facsimile number in the facsimile header (317-573-5414) matches the facsimile number listed in the Indiana Ready Mixed Concrete Association 2003-2004 membership directory

for CARMEL; that directory also lists CARMEL's address as 12368 Hancock Street, Carmel, IN 46032. Again according to the transmission information contained in the facsimile header, the CARMEL price list was faxed to CW's company on February 26, 2004, five weeks prior to its April 1 effective date. The fact that CARMEL engaged in direct communications with a competitor regarding prospective pricing is consistent with the price-fixing conspiracy detailed by HUGHEY and described in this affidavit and reinforces the probable cause that the conspiracy existed.

b. CARMEL also forwarded an IMI price list to CW's company; the IMI price list was faxed from a facsimile machine at CARMEL's offices – as evidenced by the transmission information contained in the facsimile header – and received by a facsimile machine at the offices of CW's company. The facsimile number in the facsimile header (317-573-5414) matches the facsimile number listed in the Indiana Ready Mixed Concrete Association 2003-2004 membership directory for CARMEL; that directory also lists CARMEL's address as 12368 Hancock Street, Carmel, IN 46032. Again according to the transmission information contained in the facsimile header, the IMI price list was faxed to CW's company on February 26, 2004, five weeks prior to its April 1 effective date. The fact that CARMEL (a) was in possession of a competitor's price list five weeks before it was effective and (b) was engaged in direct communications with CW's company, a competitor, regarding prospective pricing is consistent with the price-fixing conspiracy detailed by HUGHEY and described in this affidavit and underscores the probable cause that the conspiracy existed.

c. CW also received a SHELBY price increase letter directly from CARMEL. The SHELBY price increase letter was faxed from a facsimile machine at CARMEL's offices – as

evidenced by the transmission information contained in the facsimile header – and received by a facsimile machine at the offices of CW's company. The facsimile number in the facsimile header (317-573-5414) matches the facsimile number listed in the Indiana Ready Mixed Concrete Association 2003-2004 membership directory for CARMEL; that directory also lists CARMEL's address as 12368 Hancock Street, Carmel, IN 46032. The SHELBY price increase letter was faxed to CW's company on February 26, 2004, five weeks prior to its April 1 effective date. The fact that CARMEL was engaged in direct communications with CW's company, a competitor, regarding a competitor's prospective pricing is consistent with the price-fixing conspiracy detailed by HUGHEY and described in this affidavit and reinforces the probable cause that the conspiracy existed.

29. CW also received a letter in the United States mail dated October 31, 2003 from Jason MANN, President of AMERICAN, addressed to CW's company. In that letter MANN details a "Winter Conditions" charge that AMERICAN will be instituting beginning in December, 2003 as well a $2.00 across-the-board price increase beginning April 1, 2004.

30. I personally interviewed Jason MANN, President of AMERICAN, on two occasions: March 21, 2004 at his residence (956 Breaside Lane, Greenwood, Indiana 46143); and on March 29, 2004 at AMERICAN's offices (845 West Troy Avenue, Indianapolis, Indiana 46225).

a. During the March 21 interview, Mann discussed AMERICAN's business generally as well as how he came to be in charge of AMERICAN's operations after the death of his father. MANN told me that ready mixed concrete companies would communicate their prices directly to competitors, faxing price sheets to each other; he noted specifically that IMI and

SHELBY had done so. MANN also told me that some ready mixed concrete companies wanted ready mixed concrete companies to reach an agreement to set prices and that Fred ("Pete") IRVING of IMI was the driving force behind the price-fixing scheme. MANN also told me that there is an Indiana Ready Mix Association, which is controlled by IMI.

b. During the March 29 interview, MANN informed me that he had received communications directly from another ready mixed concrete company regarding a bid proposal he had submitted for the Carmel School District. Specifically, the competitor faxed MANN a copy of AMERICAN's bid proposal for the Carmel School District project. That facsimile contained a header suggesting to Affiant that it had been faxed from IMI Sales. Moreover, the facsimile, which I have reviewed, contained handwritten language calling into question the price at which AMERICAN bid the project. Also during that March 29 interview, MANN told me that Price IRVING was taking over operations at IMI and that Butch NUCKOLS of BUILDER'S is the ringleader behind the Indianapolis area price-fixing scheme for ready mixed concrete.

c. I understood MANN's statements to me that Fred ("Pete") IRVING of IMI was the driving force behind the price-fixing scheme and that Butch NUCKOLS of BUILDER'S is the ringleader behind the Indianapolis area price-fixing scheme to mean that Fred ("Pete") IRVING was a leading proponent of the price-fixing scheme, and that Butch NUCKOLS was responsible for implementing the scheme.

31. The investigation has established that probable cause exists to believe that CARMEL, IMI, BUILDER'S, SHELBY, AMERICAN, and BEAVER regularly use the United States mail in the conduct of their ready-mixed concrete business, including, but not limited to, the distribution of invoices and the receipt of payments. In addition, CW has told me that SHELBY,

BEAVER, and AMERICAN have each purchased trucks used in their ready mixed concrete business from out-of-state manufacturers and that CARMEL, BUILDER'S, IMI, and BEAVER have each purchased plants used in their ready mixed concrete business from out-of-state manufacturers. Moreover, some of those companies provide ready mixed concrete for projects that directly involve interstate means of transportation, including, but not limited to: SHELBY's work on United States Interstate 74; IMI's provision of concrete for the Indianapolis International Airport and various interstate highway projects; and BUILDER's work on the construction of Allisonville Road, which connects directly to United States Interstate 465. There is also probable cause to believe that in conducting the price-fixing conspiracy, CARMEL, IMI, BUILDER'S, SHELBY, AMERICAN, and BEAVER continued to regularly use the United States mail to distribute invoices and to receive payments.

32. I believe that the ready mixed concrete price-fixing conspiracy described in this affidavit continues to be in operation, though, as noted in paragraph 27, there have been deviations from the conspiracy on occasions. In addition to the recordings described in paragraphs 23-25, I have received price lists effective April 1, 2004, which CW has told me are consistent with the conspiratorial scheme.

V. EVIDENCE TO BE SEIZED

33. The facts set forth above establish probable cause to believe that (a) CARMEL, IMI, BUILDER'S, SHELBY, BEAVER, and AMERICAN have been engaged, and continue to engage, in a criminal conspiracy to fix prices for ready mixed concrete and (b) evidence and instrumentalities of the conspiracy are located at these companies in the areas listed in paragraph 48 associated with Scott HUGHEY, Fred ("Pete") IRVING, Price IRVING, Dan BUTLER, Butch

NUCKOLS, Phillip HAEHL, Gary BEAVER, Chris BEAVER, and Jason MANN.

34. All the documents requested are business records of the companies named in paragraph 4. It has been my experience, and CW has confirmed, that records of price fixing are usually kept and maintained at the participant's office, so that they may be referred to over the course of the conspiracy. Such records include, but are not limited to, such items as: price announcements and other documentation of prices offered and charged; handwritten notes reflecting the agreed-upon prices; notes or memoranda of meetings at which prices were fixed; documentation of telephone conversations between or among participants in the conspiracy, including notes or memoranda of the conversations and charge records for the conversations; names, addresses, telephone numbers, and electronic mail (e-mail) addresses of co-conspirators; and notes, memoranda, correspondence, reports, and other records and documentation relating to any agreements, meetings, conversations, or other communications or contacts between or among companies that sell or distribute ready mixed concrete.

35. Where a company secures business through a competitive bidding process as the companies listed in paragraph 4. do at times, conspiratorial records may also include bid files and estimate work sheets which contain cost, overhead, and profit data used in preparing a bid. Furthermore, some of the documents to be seized must be maintained for use in preparing federal and state income taxes for use in the event of an audit; the Internal Revenue Service (IRS) informs business taxpayers to maintain records for at least three years. IRS, *Business Recordkeeping*, www.irs.gov.

36. Further, it is often helpful in an antitrust investigation to obtain pricing and sales data for the period prior to known conspiratorial activity in order to obtain evidence of pricing or

sales changes caused by the conspiracy. Thus, the items to be seized include pricing and sales data for a period of time prior to the known conspiratorial activity. CW told me that the ready mixed concrete companies involved in the price-fixing conspiracy issue price lists on average once a year, though in the last five years those companies may have only issued two or three price sheets each. For that reason, in order to secure relevant documents for both the conspiracy and pre-conspiracy period, it is necessary to seize documents dating back to 1999. I am, therefore, requesting a search warrant for the documents described in **Exhibit B** to the Search Warrant.

37. As noted in paragraph 30.a. Jason MANN, President of AMERICAN, told me that ready mixed concrete companies would fax price sheets to each other and, specifically, that IMI and SHELBY had faxed price lists to competitors. MANN also told me, as noted in paragraph 30.b., that a ready mixed concrete company communicated directly with him by means of a facsimile communication regarding a bid by AMERICAN. Moreover, as detailed in paragraphs 28.a., 28.b., and 28.c., CARMEL faxed price lists from CARMEL and IMI and a price increase letter from SHELBY directly to CW's company, a competing ready mixed concrete company, to prove that other ready mixed concrete companies were pricing consistently with the price-fixing conspiracy. Therefore, facsimile machines maintained and used by CARMEL, IMI, BUILDER'S, SHELBY, AMERICAN, and BEAVER are instrumentalities of crime, used to, among other things, facilitate illegal price communications among competitors and will be seized to provide information such as the dates and times pricing information was communicated as well as identifying information unique to the facsimile machines.

38. It has been my experience, and has been confirmed by CW, that business records such as the price lists, correspondence, and other types of documents to be seized are frequently

created, stored, and maintained with computer hardware equipment and software, such as disks, magnetic tapes, programs, and computer printouts. Additionally, such information may be stored on personal laptop computers, e-mail servers, and in other electronic devices.

39. During the course of this investigation I have consulted with Special Agent E. Fox, FBI - Indianapolis, Indiana. Agent Fox has been with the FBI for approximately 7 years and has received extensive training in the area of computer forensics and has served as a field computer forensic examiner (CFE). The training he has received includes the planning, preparation, and execution of search warrants involving computers and related equipment, electronic data preservation, and the recovery, documentation and authentication of evidence. Agent Fox has assisted in the preparation and execution of over 40 search warrants involving computers, including their seizure and subsequent forensic examination for evidence.

40. Based upon Agent Fox's training and experience, he advised that, in order to completely and accurately retrieve data maintained in computer hardware or on computer software, to insure the accuracy and completeness of such data, and to prevent the loss of the data either from accidental or programmed destruction, it is often necessary that the computer equipment, peripherals, related instructions in the form of manuals and notes, as well as the software utilized to operate such a computer, be seized and subsequently processed by a qualified computer specialist in a laboratory setting. This is true because of the following:

a. Technical requirements. Analyzing computer systems for criminal evidence is a highly technical process requiring expert skill and a properly controlled environment. The vast array of computer hardware and software available requires even computer experts to specialize in some systems and applications. Thus it is

difficult to know prior to the search which expert possesses sufficient specialized skills to best analyze the system and its data. No matter which system is used, however, data analysis protocols are exacting scientific procedures, designed to protect the integrity of the evidence and to recover even hidden, erased, compressed, password-protected, or encrypted files. Since computer evidence is extremely vulnerable to tampering or destruction (both from external sources or from destructive code imbedded in the system as a "booby trap"), removing the computer from the search site (where it is extremely difficult to maintain its security during the potentially lengthy search process) to a controlled environment is often essential to its complete and accurate analysis. Further, the determination as to the existence and types of computer security devices which could cause destruction of evidence is extremely time consuming and could substantially lengthen the duration of the search and thus increase the difficulty of securing the computer system on-site during the search.

b. The volume of evidence. Computer storage devices (such as hard disks, diskettes, tapes, laser disks, Bernoulli drives, etc.) can store the equivalent of thousands of pages of information. Additionally, a user may seek to conceal criminal evidence by storing it in random order and/or with deceptive file names on the hard drive or other storage devices. Searching authorities are thus required to examine all the stored data to determine which particular files are evidence of criminal activity and fall within the scope of the Search Warrant. See Paragraph 47 below. This searching and sorting process can take weeks or months, depending on the volume

of data stored, and it would be impractical to attempt this kind of data analysis on-site. Furthermore, records stored in computer storage devices and responsive to the warrant may be retrievable using sophisticated reconstruction methods despite the fact that those records were purportedly erased or deleted. Should such data retrieval be necessary, it could substantially lengthen the duration of the search and thus increase the difficulty of securing the computer system on-site during the search.

41. Despite these facts, I recognize that the companies listed in paragraph 4. are functioning companies and that a seizure of their computer network(s) may have the unintended and undesired effect of limiting the companies' ability to provide legitimate services to its customers. In response to these concerns, the agents who execute the Search Warrant will take an incremental approach to minimize the inconvenience to the companies being searched and to minimize the need to seize equipment and data. This incremental approach will be explained to all of the agents on the search team before the search is executed.

42. According to Agent Fox, if the CFE decides that printing out, making electronic copies of specific files, or imaging those parts of the subjects' computers or other electronic storage devices likely to contain documents described in **Exhibit B** to the Search Warrant is impractical or insufficient, then the FBI will seize the relevant components of the company's computer hardware, equipment and other peripherals, including magnetic storage devices and the central processing units (CPUs), in order to fully retrieve data from the computer system by searching these components in a laboratory or controlled environment.

43. Similarly, according to Agent Fox, in order to completely and accurately retrieve

data maintained on network servers it may be necessary to seize those servers so that they may be processed by a qualified computer specialist in a laboratory setting. This may be necessary where the search location does not maintain an adequate backup system, where employees at the search location lack requisite knowledge regarding the servers, or where knowledgeable employees are uncooperative. Servers will be seized only as a last resort.

a. The FBI will follow a three-step process before resorting to the seizure of network servers: first, they will attempt to make backup copies of files present on the servers at the search location; second, if they are unable to make backup copies of the servers, they will selectively copy files responsive to items identified in **Exhibit B** to the Search Warrant from the servers; and third, if and only if they are unable to copy those files from the servers, the FBI will seize the servers, immediately bring them to a laboratory or controlled environment, copy the servers, and promptly return the servers to the search location.

b. The FBI recognizes that seizure of servers may significantly hamper the ongoing business operations of the compan(y/ies) from whom servers are seized and, therefore, the FBI will: seize servers only where necessary; make copying seized servers a top priority; and return any seized servers to the search location as promptly as practicable. If circumstances arise in the execution of this Search Warrant such that it becomes necessary to seize servers, the CFE will take reasonable measures to protect the rights and privacy of all individuals whose data or information is contained on seized servers, but which is not responsive to the warrant. Furthermore, access to such non-responsive data and information will be denied to all individuals other than the CFE and other computer analysts designated by the FBI.

44. In addition, Agent Fox stated that the accompanying software must also be seized,

since it may not be possible without examination to determine that it is standard, commercially available software. It is necessary to have the software used to create data files and records in order to read the files and records. In addition, without examination, it may not be possible to determine that the diskette purporting to contain a standard commercially available software program has not been used to store records instead.

45. Agent Fox also informed me that any data security device (including passwords) and instruction manuals, meaning any and all written or printed material which provides documentation, instructions or examples concerning the operation of a computer system, computer software, and/or any related device are also necessary to properly operate the specific system in order to accurately obtain and copy the records that fall within the scope of the Search Warrant.

46. Thus, based on the information set forth above, if the CFE determines during the search that information contained in the computer system and related computer equipment and storage devices cannot be successfully retrieved, printed, copied, or imaged to depict the exact environment in which the data was created on-site, I seek the authority to seize the following types of devices and materials and to conduct an off-site search of the hardware and software for the evidence described above:

a. Computer hardware, meaning any and all electronic devices which are capable of analyzing, creating, displaying, converting, or transmitting electronic or magnetic computer impulses or data. These devices include those computers, computer components, network servers, computer peripherals, cables, word processing equipment, modems, monitors, printers, plotters, encryption circuit boards, optical scanners, external hard drive, and other computer-related electronic devices

including personal digital assistants, which relate to the storage, production or processing of documents and other records identified in this Affidavit (including those listed in **Exhibit B**) or which, in the judgment of the CFE, will be necessary to rebuild the system and to have it function properly off-site;

b. Computer software, meaning any and all instructions or programs stored in the form of electronic or magnetic media which are capable of being interpreted by a computer or related component. The items to be seized include operating systems, application software, utility programs, compilers, interpreters, and other programs or software used to communicate with computer hardware or peripherals either directly or indirectly via telephone lines, radio, or other means of transmission; and

c. Any data security device (including passwords) and instruction manuals, meaning any and all written or printed material which provides documentation, instructions or examples concerning the operation of a computer system, computer software, and/or any related device. Further, even if imaging is successful, instruction manuals and data security devices (including passwords) may need to be seized in order to aid in the off-site forensic analysis of the evidence.

47. Agent Fox informed me that the analysis of electronically stored data, whether performed on-site or in a laboratory or other controlled environment, may entail any or all of several different techniques. Such techniques may include, but shall not be limited to: surveying various file "directories" and the individual files they contain (analogous to looking at the outside of a file cabinet for the markings it contains and opening a drawer capable of containing pertinent files, in order to locate the evidence and instrumentalities authorized for seizure by the warrant);

"opening" or reading the first few "pages" of such files in order to determine their precise contents; "scanning" storage areas to discover and possibly recover recently deleted data; scanning storage areas for deliberately hidden files; or performing electronic "key word" searches through the entire electronic storage area to determine whether occurrences of language contained in such storage areas exist that are intimately related to the subject matter of the investigation.

48. Agent Fox also stated that e-mail may be stored individually on a user's computer or, in larger commercial entities, may reside collectively in a specialized server commonly referred to as an "e-mail server." For instance, under some e-mail applications such as Microsoft Outlook, the e-mail for all individuals on the system is maintained in one large database-type file with a .pst extension. To obtain the e-mail messages of one individual, it is sometimes necessary to image the entire e-mail database on an e-mail server, deconstruct that file, then withdraw the required data or information. If such circumstances arise in the execution of this warrant, the CFE will take reasonable measures to protect the rights and privacy of all individuals whose e-mail does not contain data or information responsive to the warrant. Furthermore, access to the non-responsive portion of the .pst file will be denied to all individuals other than the CFE and other computer analysts designated by the FBI.

VI. PREMISES TO BE SEARCHED

49. The search will be limited to the office(s) of the individual employees named in **Exhibit A** to the Search Warrant; any file or storage rooms adjacent to their office(s); the areas where their secretar(y/ies)/assistant(s) sit and work; and all computer rooms and areas (including the contents of any network or e-mail servers), document storage areas, filing cabinets, filing containers, facsimile machines, and safes on the premises that are likely to be under their control or

that are likely to contain their business records, files, correspondence, calendars, or other documents. These areas are located within the offices of those employees' respective companies, as more particularly described in **Exhibit A** to the Search Warrant.

50. There is probable cause to believe that evidence of the price-fixing conspiracy and relevant facsimile machines are located on the premises to be searched (as described in **Exhibit A**), including:

a. **CARMEL** – the fact that CW received a price sheet directly from CARMEL with prices effective April 1, 2004 and which contained the address of the premises to be searched – 12368 Hancock Street, Carmel, Indiana 46032 – in the text of the document as well as a facsimile header indicating it was sent from a facsimile machine with the same number (317-573-5414) as the number listed for the facsimile machine at CARMEL's Hancock Street address (*i.e.* the premises to be searched). Moreover, the price sheet was printed on paper bearing the name "Carmel Concrete Products," CARMEL's logo, as well as the address "12368 Hancock Street, Carmel, Indiana 46032" and "Fax 573-5414." Moreover, that price sheet indicates that CARMEL was pricing its ready mixed concrete consistent with the conspiratorial agreement described above in subparagraphs 23.f., 25.a., 25.b., and 25.c. In addition, the address of the premises to be searched is consistent with the business address of CARMEL as listed with the Indiana Ready Mixed Concrete Association 2003-2004 membership directory and in the Dun & Bradstreet Business Information Reports. In addition, I have personally observed the location listed as the premises to be searched and my observations give me reason to believe that CARMEL conducts business operations from that location.

b. **IMI** – the fact that CW received a ready mixed concrete price sheet with an

effective date of April 1, 2004 on IMI letterhead, which lists IMI's address as "8032 North State Road 9, Greenfield, IN 46140," the same as the premises to be searched, and indicating that the company conducts ready mixed concrete business from that location. Moreover, the premises to be searched is listed in the Dun & Bradstreet Business Information Reports as being the address for IMI, the premises to be searched is consistent with the business address of IMI as listed with the Indiana Ready Mixed Concrete Association, and IMI's own website – www.irvmat.com – lists the premises to be searched as the location of the branch office serving the company's "Central" region. In addition, I have personally observed the location listed as the premises to be searched and my observations give me reason to believe that IMI conducts business operations from that location.

c. **BUILDER'S –**

1. the fact that the premises to be searched – 9170 E 131st Street, Fishers, IN 46038 – is listed in the Dun & Bradstreet Business Information Reports as being the address for BUILDER'S and is consistent with the business address of BUILDER's as listed with the Indiana Ready Mixed Concrete Association. Moreover, BUILDER'S own website – www.bcconcrete.com – lists the company's office telephone number as (317) 849-1788 and facsimile number as (317) 849-1444, both of which match the numbers listed in the Dun and Bradstreet report, which identifies the premises to be searched as the address for BUILDER'S. In addition, I have personally observed the location listed as the premises to be searched and my observations give me reason to believe that BUILDER'S conducts business operations from that location.

2. CW has additional bases for knowing that Butch NUCKOLS' maintains an office at the 9170 E 131st Street, Fishers, IN 46038 address. Within the past year,

CW learned from a contractor that NUCKOLS was upset that CW's company was involved in concrete work for a car dealer on a parcel of land directly across the street from BUILDER'S offices at the premises address. BUILDER'S was the previous owner of that land and the CW learned from the contractor that NUCKOLS told the contractor that he was not going to sit in his office and watch another concrete company (*i.e.* CW's company) pour concrete on land that BUILDER'S sold. In addition, CW visited BUILDER'S offices at 9170 E 131st Street, Fishers, IN 46038, seven to eight years ago and observed Butch NUCKOLS emerge from his office at that location.

d. **BEAVER** – the fact that the premises to be searched – 16101 River Road, Noblesville, IN 46060 – is listed in the Dun & Bradstreet Business Information Reports as being the address for BEAVER and is consistent with the business address of BEAVER as listed with the Indiana Ready Mixed Concrete Association. Moreover, the Associated Builders and Contractors of Indiana website – www.abc-indy.org – lists BEAVER's telephone number as (317) 773-0679 and facsimile number as (317) 773-0048, both of which match the numbers listed in the Dun and Bradstreet report, which identifies the premises to be searched as the address for BEAVER. Furthermore, CW attended a meeting regarding a county road-building project at BEAVER's offices at 16101 River Road several years ago and CW knows that location is BEAVER's headquarters. In addition, I have personally observed the location listed as the premises to be searched and my observations give me reason to believe that BEAVER conducts business operations from that location.

e. **AMERICAN** – the fact that Affiant interviewed Jason MANN, President of AMERICAN, at 845 West Troy Avenue, Indianapolis, IN 46225 on March 29 (see paragraph 30.); during that interview, Affiant personally observed the location listed as the premises to be searched

and Affiant's my observations give Affiant reason to believe that AMERICAN conducts business operations from that location.

f. **SHELBY** – the fact that the premises to be searched – 157 E. Rampart Road, Shelbyville, Indiana 46176 – is consistent with an address of SHELBY listed with the Indiana Ready Mixed Concrete Association. I have personally observed the location listed as the premises to be searched and my observations give me reason to believe that SHELBY conducts business operations from that location. In addition, I made a telephone call to (317) 398-4485, the telephone number listed in the Indiana Ready Mixed Concrete Association 2003-2004 membership directory as the telephone number for SHELBY's Shelbyville offices (as identified in **Exhibit A** to the Search Warrant), posing as a marketing representative and confirmed with the person receiving the call that the location is SHELBY's headquarters and that Phillip HAEHL is the onsite point of contact for that location.

51. In order to minimize the prospect of the removal and subsequent destruction of any of the records identified in **Exhibit B** to the Search Warrant, the search will include the briefcases, laptop computers, and other movable document containers located in the offices of, in the possession of, or readily identifiable as belonging to the individuals identified in **Exhibit A** to the Search Warrant.

VII. CONCLUSION

52. In light of the foregoing, I respectfully request that a search warrant be issued authorizing law enforcement personnel to search the office(s) of the individual employees named in **Exhibit A** to the Search Warrant; any file or storage rooms adjacent to their office(s); the areas where their secretar(y/ies)/assistant(s) sit and work; and all computer rooms and areas (including the

contents of any network or e-mail servers), document storage areas, filing cabinets, filing containers, facsimile machines, and safes on the premises that are likely to be under their control or that are likely to contain their business records, files, correspondence, calendars, or other documents, all located within the offices of those employees' respective companies, as more particularly described in **Exhibit A** to the Search Warrant, and to seize the records and documents listed in **Exhibit B** to the Search Warrant applied for herein. These records and documents constitute evidence of a conspiracy to fix prices in violation of Title 15, United States Code, Section 1 and, as noted above, the facsimile machines are instrumentalities of this crime, and are subject to seizure pursuant to Rule 41 of the Federal Rules of Criminal Procedure.

53. **I request that the search warrant application and this affidavit be sealed.** This investigation is ongoing. Premature disclosure of the contents of this affidavit would frustrate this investigation by immediately alerting the targets of this investigation to the nature of the probe, the techniques employed, the evidence developed to date, and limit the use of the grand jury to develop further admissible evidence. This affidavit also contains information about a cooperating witness, who has been cooperating with the investigation and whose identity has not yet been revealed. The FBI and the Antitrust Division treat such information as confidential.

Steven L. Schlobohm
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this 21st day of May, 2004, at Indianapolis, Indiana.

UNITED STATES MAGISTRATE JUDGE

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 08/20/2004

Scott Hughey, white male, date of birth REDACTED—, ——, Place of Birth Indianapolis, Indiana, Social Security Account Number REDACTED, was interviewed at the Department of Justice (DOJ), Antitrust Division, Midwest Field Office, 209 South LaSalle Street, Suite 600, Chicago, Illinois. Hughey was represented by his attorney, Scott Shockley. Also present during the interview were DOJ Trial Attorneys Frank Vondrak, Michael Boomgarden, Jonathan Epstein, and Paralegal Specialist Lauren Jankowski. The interview was pursuant to a proffer letter issued by the DOJ, Antitrust Division. After identifying personnel present for the interview and the nature of the interview, Hughey furnished the following information:

Hughey Incorporated, also known as Carmel Concrete (CC), was started by Hughey's grandfather and sons. In the mid to late 60s, CC purchased a pre-cast company in Carmel, Indiana which led to their involvement in the ready-mix industry. CC was primarily a residential supplier of ready-mix concrete, although later expanded into the commercial market as well.

Presently, CC operates approximately 38 ready-mix concrete trucks with an annual revenue between $11 and $13 million. CC has five plants at three different locations providing service to Marion and surrounding counties. The plants are located in Carmel, Rock Island, and the Southside of Indianapolis. The company employs 54 union workers and 14 administrative/sales people.

Hughey has been involved in the family business since he was a small boy. He became a full-time employee after graduating from high school. Hughey has held several lower level positions before becoming a manager. Sometime between 1986 and 1988, Hughey became responsible for the company's pricing policies. Hughey became President when his father retired in 1991. Hughey still maintains oversight of the company's pricing policies.

Currently, Virgil Mabry is CC's Sales Manager. Mabry has worked at CC for about eight years. CC did not have a Sales Manager between the time Hughey became President and the hiring of Mabry. Mabry had previously worked for Prairie Materials before working at CC. Mabry is responsible for supervising two company

Investigation on 08/19/2004 at Chicago, Illinois

File # 60-IP-93296 Date dictated 08/20/2004

by SA Steven L. Schlobohm -sls (S:SQ5\233sls01.302)

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salesmen, Scott Noel and Jeff Humble. Noel has worked at CC for about eight years while Humble has been employed between six and eight years. Bob Gibson has been the company's controller since December 20, 2003.

CC's competitors are Irving Materials Incorporated (IMI), Prairie Materials, American Concrete, Shelby Materials, Southside Ready-Mix, which is owned by IMI, Beaver Materials, Builders Concrete, and Baja, a minority company operated by Prairie Materials.

CC price increases typically take effect April 1st of each year. This around the same time the Cement and Aggregate suppliers raise their prices. IMI typically announces their price increase first before the other ready-mix companies follow suit.

Even prior to Hughey becoming President, CC engaged in price increase discussions with IMI. Hughey's father regularly discussed price increases with representatives from IMI. After becoming President, Hughey continued to meet and discuss price increases with IMI representatives in particular John Huggins. Huggins and Hughey typically met at the Cracker Barrel restaurant located at I-69 and 96th Street. Hughey also believed he discussed price increases with Pete Irving, although could not be certain. The price increase discussions typically occurred in March of each year.

When Hughey and Huggins met, they typically discussed whether the market could withstand an increase and the amount of the increase. There were times when they agreed upon a specific dollar increase and other times when it would be decided later. Since IMI was the larger producer of ready-mix concrete, Hughey typically deferred the price increase amount to Huggins.

After the meetings, someone from IMI would contact Builders Concrete and inform them of the agreed upon price increase. IMI would issue their price increase announcement first with CC and other competitors following suit. Hughey typically initiated the price increase meetings with Huggins each year. Over time, Hughey became uncomfortable having price increase discussions with Huggins and began to communicate more with Butch Nuckols of Builders Concrete. Huggins retired from IMI prior to the September 11, 2001, terrorist attacks.

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Hughey stated he has been involved in price increase discussions with other ready-mix suppliers since 1991. Even prior to 1991, Hughey felt there were price increase agreements between competitors. He could not provide an exact date for when there was a firm pricing agreement between competitors but added that this "thing," price increase discussions, has been going on forever. Hughey estimated that CC, IMI and Prairie Materials have been discussing price increases since the mid 80s.

While Mabry was employed by Prairie Materials, Hughey and Mabry would meet to discuss price increases. During this time period, Hughey does not recall talking with Gary Matney about price increases, although Mabry had implied Matney knew about their discussions.

While Mabry was still employed at Prairie Materials, Hughey recalled having price increase discussions with him at McDonalds off I-69 & 96th street. Hughey also had price increase discussions with Nuckols at Hardees off Allisonville and 116th street as well as Keystone and 116th street. Hughey also admitted having price increase discussions with Richard Haehl, Shelby Materials, at the Cracker Barrel located off I-69 & 96th street and 38th street & I-465. Hughey recalled having three pricing discussions with Matney. Two were at the Cracker Barrel off 38th street and I-465 and one at Mountain Jacks located near the same intersection. Hughey could not provide exact dates for the above meetings, but indicated he might be able to provide time frames if allowed to review documents previously seized by the Federal Bureau of Investigation.

Hughey recalled meeting with Jason Mann, American Concrete, on the southside of Indianapolis to discuss an issue involving KRV Concrete. The exact date of the meeting was unknown but around the same time Mann's daughter was born. KRV had been a CC customer when Mann under cut CC's price by $3 per cubic yard. Hughey, upset by the price cut, told Mann that CC would under cut prices on one of Mann's established customers.

Hughey recalled three large meetings involving most of the Indianapolis area ready-mix concrete suppliers. The purpose for the meetings were to discuss pricing at which they sold ready-mix concrete and other additives. Hughey was unsure of the exact dates for the meetings. He added that if he was allowed to review company records then he might be able to better identify a time frame for which the meetings occurred.

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The first meeting occurred sometime around May of 2002 at the Signature Inn with subsequent meetings taking place at Nuckols' horse barn. Hughey furnished the following details regarding each of the three meetings:

Signature Inn:

Nuckols called Hughey expressing the need to setup a meeting with area ready-mix suppliers. The purpose for the meeting was to re-establish the maximum discount applied to bid work. During the phone conversation, Nuckols said this thing, implying the setting of discounts, was falling apart. Nuckols and Hughey agreed to have a meeting with area suppliers. Nuckols contacted the other ready-mix suppliers and invited them to the meeting. Hughey believed the meeting took place sometime in May of 2002.

Hughey reserved the conference room and paid all the associated fees. The following people attended the Singnature Inn meeting: Hughey, Nuckols, Rick Beaver, Price Irving, Dan Butler, believe Tim Kuebler, and either one or both of the Haehls. No representatives from American Concrete or Prairie Materials attended this meeting.

The meeting occurred on a workday during the early afternoon and lasted about two hours. Nuckols and Hughey opened the meeting by stating we tried this thing before, referring to the setting of discounts, but people have not been following through on the agreement. There was general pricing discussions among the attendees. At the end of the meeting everyone agreed to set the maximum discount off net price which would be applied to bid work. Hughey believed the agreed upon discount was $3.50 although was not certain. The review of company sales records would help determine the exact agreed upon discount.

At the conclusion of the meeting, everyone agreed to limit discounts applied to bid work. Hughey believes, although not certain, that everyone agreed to limit discounts to $3.50 off the net price. No one voiced any objections to the agreement. Hughey and the other attendees left the meeting with the understanding they all had agreed to limit discounts on bid work. After the meeting, Hughey bid work in conformity with the agreement as did the other competitors.

In the fall of 2002, Hughey called and met with Butler at the Burger King off I-69 and 96th street. Hughey told Butler he

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felt people were not abiding by agreement. He also said he would no longer abide by the agreement. Hughey was not certain but believed Pete Irving arrived later. Hughey also met and informed Rick Beaver and Nuckols of his decision. Rick Beaver had told Hughey that he felt Nuckols was the person undermining the agreement.

Hughey believed the pricing agreement was off from the fall of 2002 until sometime in late 2003, when Nuckols hosted a meeting at his horse barn with other area ready-mix suppliers.

First Horse Barn Meeting:

Prior to the first horse barn meeting, Hughey observed competitor bids approaching $7 to $8 off net. Hughey called Nuckols and they agreed to get everyone together to discuss pricing. Nuckols suggested having the meeting at his horse barn. Nuckols setup the meeting and contacted the other suppliers.

The meeting was held on a workday in late 2003, exact date not recalled but believed to be a couple of months before Halloween. The following people attended the meeting: Hughey, Nuckols, Price Irving, Butler, think Keubler, one or both of the Haehls, and Chris Beaver or Rick Beaver. Hughey believed Chris Beaver attended the meeting since Chris replaced Rick at the meetings because Rick easily got confused.

Hughey and Nuckols discussed the purpose for the meeting and how crazy pricing was getting with respect to bid work. At the end of the meeting, everyone agreed to limit discounts at either $5 or $5.50 off the net price. The Haehls asked about the application of the discount and Hughey recalled it being specifically stated that the discount applied to the net price. Hughey could not recall each person's comments at the meeting, but acknowledged everyone was supportive of the agreement. Everyone left the meeting agreeing to limit discounts on bid work. The discount was to take effect within a couple of weeks of the meeting.

Second Horse Barn Meeting:

The second horse barn meeting was prompted by a conversation Nuckols and Hughey had about the agreement falling apart. Both, Nuckols and Hughey, agreed to have another meeting with the other competitors.

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Hughey did not recall the exact date for the second horse barn meeting but stated it was close to Halloween because the barn was decorated with Halloween paraphernalia. The following people attended this meeting: Hughey, Nuckols, Price Irving, Dan Butler, Chris Beaver, John Blaztheim, and both Haehls.

Nuckols opened the meeting by stating people were not abiding by the agreement and the purpose for this meeting was to re-establish the $5.50 discount and propose going to a $3.50 discount. Hughey could not recall the time frame for going to the $3.50 discount but added it was long enough for them to deliver the message to Matney. The group also talked about the need for having Prairie Materials join the agreement. Hughey recalled Butler stating that they were not going to let Prairie ruin the agreement. If Matney refused to join the agreement, then the group would try to find his price and have competitors take turns matching or beating his price. Butler agreed to contact Matney.

During the meeting, the group also discussed raising prices and implementing an environmental or winter service charge. Hughey or Nuckols proposed the need for a price increase. The group also talked further about implementing the winter service charge mentioning that other places around the country were applying the charge.

At the end of the meeting, everyone agreed to re-establish the $5.50 discount with plans of going to $3.50 of net. Hughey does not recall the group setting a specific price increase amount or winter service charge. Everyone attending the meeting agreed to the above terms. There were no objections raised by any of the attendees.

Meeting with Matney:

Hughey recalled Butler having problems meeting with Matney, so Hughey attempted to contact him. After exchanging phone calls and voice mails, Hughey met Matney at the Cracker Barrel located off 38th Street and I-465 on the westside. The meeting took place near the wedding date of Matney's daughter which would have been two to three weeks after the second horse barn meeting. The meeting took place during the week and late in the afternoon.

At the meeting, Hughey informed Matney of the agreement by the other ready-mix suppliers to limit discounts. The plan was to limit discounts on bid work to $5.50 with intentions of going to

FD-302a (Rev. 10-6-95)

60-IP-93296

Continuation of FD-302 of Scott Hughey , On 08/19/2004 , Page 7

$3.50 off. Matney responded to Hughey's proposal by stating he would see where it goes. Based upon Hughey's dealings with Matney, he felt Matney had agreed to the arrangement. Hughey was not certain but believed he called Nuckols after meeting with Matney.

The interview was terminated at approximately 3:22 pm so Hughey and his attorney could make a return flight back to Indianapolis.

Price-Fixing Motivations

University of East Anglia

CENTRE FOR COMPETITION POLICY

The Price Fixer: Compliance Tales from the Other Side

Andreas Stephan
Centre for Competition Policy and School of Law,
University of East Anglia

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Abstract: This paper fills an important gap in the antitrust compliance literature by exploring the perspective of the price fixer in breaches of competition law. It provides a critical analysis of statements made by price fixers, their competition lawyers and in-house counsel involved in cartel cases. The study draws on a combination of publicly available statements and anonymised accounts collected over 15 years of engaging with each of these three groups. It concludes that those responsible for cartels are motivated by varying factors and do not necessarily understand or accept that cartel behaviour is wrongful. Also, disciplining those individuals is complicated by the incentives created through leniency and settlement programmes. These findings highlight the importance of continued investment in compliance and the broader need for education in competition law to make it less likely that infringements will occur in the first place.

Contact: Andreas Stephan (a.stephan@uea.ac.uk)

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The Price Fixer: Compliance Tales from the Other Side

Andreas Stephan[1]

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Keywords: Competition Law, Antitrust, Compliance, Cartels.

1. Introduction

Compliance with any area of law ultimately comes down to decisions made by individual human beings, either in isolation or as part of a larger group within an organisation. The antitrust compliance debate is dominated by those working to promote compliance within the firm and – to a lesser extent – those responsible for enforcing competition law. The perspective that is typically overlooked is that of the individual(s) responsible for

[1] Professor of Competition Law, Centre for Competition Policy and School of Law, University of East Anglia, Norwich NR4 6PN, UK. Email: a.stephan@uea.ac.uk. The usual disclaimer applies. I am grateful for the many wonderful discussions I have had over the years with competition law folk involved in cartel cases, and especially for their willingness to share frank accounts of their experiences and of the decisionmakers involved.

compliance failures. Yet how people behave and what motivates them is crucial to understanding what makes a robust compliance programme. For example, it is generally assumed that efforts to hide anti-competitive conduct from customers and from others within the firm is a strong indication of delinquency and a deliberate breach of duty, yet the act of hiding does not necessarily correspond with *how wrong* the individuals viewed the conduct, whether it was encouraged or facilitated by others in the organisation, or the extent to which the requirements of the law were properly understood. It is further assumed that individuals break competition law because they are directed or encouraged to do so by senior management. That was certainly true of many of the high-profile cases like *Lysine* and *Vitamins* investigated in the 1990s and early 2000s, however reasons for non-compliance are many, varied and complex. As individuals are *only human*, they may be driven by many desires and motives. Undoubtedly the need to make profits, maximise margins and increase personal bonuses are strong factors – but these are not the only drivers of non-compliance. Individuals may be strongly motivated by other reasons: crisis, arrogance, ego or hubris, a desire not to 'let peers down', or to be 'part of a club', among others.

There is a whole spectrum of potential behaviour that must be addressed by a compliance programme, between a deliberate breach of compliance, at the one end, and an inadvertent or well-intentioned lapse of judgement, at the other. The consequences in terms of corporate fines, potential damages actions and loss of reputation are typically the same regardless of the motivations that lie behind them. Nevertheless, the perspective of the price fixer (that is the individual who engages in price fixing, rather than the company) is crucial to understanding how even businesses who invest very significantly in their compliance efforts, occasionally get caught out by individuals who fall through the net. The particular danger that exists in relation to anti-competitive agreements (as compared to say, abuse of dominance), is the ease with which employees can expose the business to the risk of liability, by simply exchanging sensitive information with a competitor, and how any business (not just those with high market power) is exposed to this risk, regardless of whether an arrangement was implemented or had any actual effect on the market.

This paper aims to fill this important gap in the literature by exploring what we know about the perspective of the price fixer, through accounts of circumstances surrounding breaches of competition law, accompanied by a discussion of the extent to which an antitrust compliance programme can be designed to deal with these scenarios. For these purposes, the paper draws on three sources of research: (i) Cases that are in the public domain and have been the subject of enforcement decisions, media reports, speeches by competition authority officials and academic research and writing; (ii) Recorded statements made in interviews or in court hearings; and (iii) Anonymised accounts that the author has collected over a period of 15 years through conversations and interviews with competition lawyers, in-house counsel and some actual price fixers. The sensitive nature of these cases (some of which were still ongoing at the time of writing) and the understandable reluctance to share

them openly by those who were directly involved, make anonymity necessary if they are to further our knowledge and be shared with a wider audience. The anonymised accounts were not collected in a uniform way or as part of a single research project. Rather they are the by-product of various strands of research into cartels that were undertaken over the 15 year period. They should therefore be treated as anecdotal and may not be representative of the motivations and experiences of all price fixers. For example, they largely capture the uncorroborated accounts of those who were willing to talk about cartel infringements (many prefer not to) and are describing cartels that were caught and subject to enforcement action. The paper focuses on five common themes that emerge from these anonymised accounts, when taken together with the other sources of research outlined above. The quotes presented in this paper are a combination of verbatim and paraphrased remarks, selected to best illustrate each theme.

The paper first explains why a better understanding of the perspective of the price fixer is important, why our knowledge of it is comparatively limited and the difficulties in accurately capturing this aspect of the compliance story. It then structures the accounts around five key themes: (i) ignorance or a poor understanding of the law; (ii) where legitimate contact between competitors leads to an infringement; (iii) crisis and other pressure points that cause individuals to engage in behaviour that they understand is wrong and would otherwise make efforts to avoid; (iv) arrogance and greed that cause individuals to break the law even though they have a good understanding of the consequences of doing so; and (v) customer facing employees (regional sales staff). The final section of the paper analyses how leniency and settlement programmes can have a distortive effect on internal compliance efforts.

2. Why is the perspective of the individual price fixer important?

How employees make decisions depends primarily on their training and on the culture of corporate governance within a business. It also depends on the characteristics and culture within the wider industry or profession and on their personal attributes: past experiences, personalities, values, their sense of right and wrong, how they regard others, among many more factors. Workplace personality tests can be used to attempt to identify individuals who are more likely to take risks, ignore others, and have a poor sense of right and wrong. But such tests are of questionable accuracy and some level of risk taking can be important to growing and innovating parts of a business.[2] Interpreting the results of such tests can also be tricky, as while one might expect risk-loving individuals to be more likely to form cartels, an early study of cartel behaviour suggested that a key attraction is the reduction of the

[2] See L Weber and E Dwoskin, 'Are Workplace Personality Tests Fair?' *The Wall Street Journal,* 29 September 2014.

uncertainties and risks associated with competition.[3] Also, while testing may give one an indication of whether an employee's general sense of right and wrong is sound, it does not necessarily capture how well they engage with morally ambiguous decision making. In their empirical work on behavioural psychology, Hodges and Steinholtz identify the importance of ethics to effective regulation and compliance.[4] In order for people to obey rules, it is important that those rules correspond with their internal moral value systems and that they consider the rules have been fairly made and applied.[5]

As will be discussed later in this paper, ethical perceptions of practices such as price fixing can be quite fluid and depend very heavily on context. For example, where there is overcapacity and very heated competition within a market (sometimes described as a 'price war'), the prospect of one competitor being driven out of the market (a natural consequence of competition in a market with declining demand) can radically change employees' perception of anti-competitive conduct. Indeed, in situations of overcapacity, it may even seem rational to agree with competitors to close down production, or otherwise hold back supply so as not to 'flood' the market. Similarly, it is important to have a good understanding of performance related pressures that employees face within an organisation, as unrealistic target setting can have a very similar effect to what is described above. So the question of whether an employee is capable of infringing competition law is not something that can easily be determined by a personality test or necessarily prevented by compliance training. If antitrust compliance efforts are to continue to evolve and become more sophisticated, one needs to have a good understanding of the circumstances and motivations that caused employees to break the law. The more of these we are able to record and study the better, as no two infringements of competition law are quite the same. The perspective of the price fixer is also important to understanding the impact of factors specific to particular industries and types of businesses.

3. Why little is known about the individual price fixer

In the era of secretive cartels prohibited by law, detailed accounts of the role of the individual are surprisingly limited. Our characterisation of the price fixer tends to be shaped by the Lysine cartel of the 1990s and covert FBI footage that provides a fascinating window into the workings of a cartel meeting. The hazy black and white FBI recording is true to the notion of a smoke-filled room in which conspiracies are hatched and executed. The

[3] G Geis, 'White Collar Crime: The Heavy Electrical Equipment Antitrust Cases of 1961' in M.D Ermann and R J Lundmann (eds.) *Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society* (New York, OUP 1987), pp. 111-130.
[4] See generally: C Hodges and R Steinholtz, *Ethical Business Practice and Regulation* (Hart 2018).
[5] N Gunningham and D Thornton, 'Fear, duty, and regulatory compliance: lessons from three research projects' in C Parker and VL Nielsen (eds), Explaining Compliance: Business Responses to Regulation (Edward Elgar, 2012); see also studies discussed in J D Jaspers, 'Managing Cartels: how Cartel Participants Create Stability in the Absence of Law' (2017) European Journal of Criminology Research, 23, pp. 319-335, at 320

protagonists – senior executives from the world's biggest Lysine manufacturers – deride antitrust enforcers and even their customers, with the now infamous line: "our customers are our enemies".[6] The workings of the cartel and the way Mark Whitacre first disclosed the price fixing conspiracy to distract from his own misconduct within Archer Daniels Midland, is set out in great detail in the books, *The Informant*[7] and *Rats In The Grain*[8]. Detailed accounts also exist of a handful of other price fixing conspiracies, such as that between the auction houses Sotheby's and Christie's.[9] These cases have etched into our minds an archetype of antitrust wrongdoing: a group of unscrupulous rogues no better than 'well-dressed thieves'.[10] Yet this characterisation is misleading, as it suggests that cartels are always deliberate breaches of the law driven by greed. From a compliance training perspective, this is unhelpful, as it creates the risk that employees will not fully engage in the nuances of competition law because they do not identify with the Lysine archetype of a price fixer and therefore discount their own risk of breaking the law. The absence, in most jurisdictions, of sanctions aimed at the individuals responsible for the cartel, also create a false sense that cartels are generally coordinated at an institutional level and not the consequence of individual decision-making.

Beyond the small number of well documented cases, there are good reasons why we know relatively little about the individuals responsible for cartels.

3.1 Little information is disclosed about price fixers in public enforcement

In most jurisdictions, competition law does not engage in the punishment of individuals, and so the focus tends to be solely on the businesses that are vicariously liable for the behaviour of their employees. Details of who within the business was responsible, their motivations and individual conduct, are either redacted from infringement decisions or are not relevant to the main purpose of the investigation: to prove the existence of the anti-competitive arrangement itself. As will be discussed later in this paper, businesses may be tempted to protect the identity of their employees and prefer not to have details of their internal compliance failures detailed publicly. The increased use of settlement procedures has resulted in less detailed cartel decisions, fewer appeals and the greater redaction of information that is not essential to the finding of an infringement. By contrast, older European Commission decisions, for example, contained far greater information about how

[6] Michael Andreas, Archer Daniels Midland. FBI covert recording of a Lysine Cartel meeting in Hawaii, March 1994.
[7] K Eichenwald, *The Informant* (Broadway Books 2000).
[8] J B Lieber, *Rats In The Grain: The Dirty Tricks and Trials of Archer Daniels Midland, The Supermarket to the World* (Basic Books, 2002).
[9] C Mason, *The Art of The Steal: Inside the Sotheby's-Christie's Auction House Scandal* (Berkley Publishing Corporation 2005).
[10] J I Klein, (Asst. Attorney General, US Department of Justice Antitrust Division), 'The War against International Cartels: Lessons from the Battlefront' Speech at the 26th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, New York, 14 October 1999.

the cartel was administered and who was involved. Even in the US where a significant number of individuals have been imprisoned for antitrust offences, not much is known because so many cases are settled at plea bargain in lieu of a full criminal trial.[11] The same is true, to a lesser extent, whenever the individuals do not contest the case. Important records of cartels, including transcripts and covert recording, do not generally enter the public domain unless they are heard in open court. It is only where a full criminal trial occurs, as in the UK prosecutions relating to *Libor* manipulation, that we are able to hear and record accounts centred on the role of the individual.

3.2 Businesses and their compliance officers do not want to talk about price fixers

Even where businesses have taken internal disciplinary action against the individuals responsible or dismissed them, there are good reasons for not publicly disclosing information about their role in an infringement. This information could further heighten any reputational damage caused by the enforcement action, could undermine trust in capital markets (especially where the failure in compliance was particularly stark or embarrassing), and could assist the cases of prospective claimants seeking damages. In any case, it is rare for an organisation's internal disciplinary proceedings to be made public – especially where they involve dismissal. It may also be that the individual and the firm decide to go separate ways at an early stage of any antirust investigation, when the precise nature of their role is still unknown. As will be discussed later in this paper, the need to secure the cooperation of the individuals responsible to cooperate effectively with competition authorities in return for leniency, can be an additional reason for protecting their identities and individual conduct.

3.3 Price fixers do not want to talk about their own past conduct

With few exceptions individual price fixers are generally very reluctant to talk about the infringements they were involved in. In some cases, they are subject to non-disclosure agreements as a condition of any severance settlement with their former employers, or are still in the employment of the firm. Those who have served gaol time in the US or are dismissed appear to find employment at a comparable level and often within the same industry, making them understandably embarrassed and unwilling to discuss their past wrongdoing.[12] These individuals may also be conscious of the possibility of incriminating

[11] See A Stephan, 'The Direct Settlement of EC Cartel Cases' (2009) International Comparative Law Quarterly, 58(3), pp. 627-654.
[12] See A Stephan, 'The UK Cartel Offence: Lame Duck or Black Mamba?' (2008) Centre for Competition Policy Working Paper No. 09-19.

themselves given the growth in individual sanctions internationally, including criminal offences.[13]

3.4 It is hard independently to verify the accounts we do have

Where there is only one source of information (whether that is the price fixer, the competition lawyer or in-house counsel), it can be difficult to engage in an objective analysis of why the breach of competition law came about. Price fixers who were motivated predominantly by greed or hubris at the time may deflect responsibility by claiming a partial understanding of the law, or by focusing on the role of others and the pressures of crisis or unrealistic target-setting by management. In doing this, they blunt the sting of any moral opprobrium associated with their conduct and this is an important caveat to the accounts presented in this paper. Similarly, where businesses and compliance officers are able to share accounts of what went wrong, they may – in some cases – omit or minimise key failures, such as wider knowledge and tacit condoning of the behaviour within the organisation at the time.

4. Perspectives of the Price Fixer

What follows is a critical discussion of the accounts of individual price fixers that raise very different challenges for antitrust compliance. They are separated into the following themes: (i) ignorance of the law; (ii) legitimate contact between competitors, (iii) pressure – crisis and 'ruinous' competition; and (iv) delinquency and arrogance.

4.1 Ignorance of the law

Despite the very emotive language that is sometimes employed by authorities to describe anti-competitive behaviour, the level of awareness among the average employee or member of the public is rather limited. Significant survey work has been carried out across jurisdictions and the results are pretty uniform: people recognise price fixing as something that is harmful, but not a practice that attracts significant moral opprobrium or is considered equivalent to serious crimes like theft and fraud.[14] In one survey where respondents in the UK were given a range of behaviours to compare price fixing too, most

[13] A Stephan, 'Four Key Challenges to the Successful Criminalisation of Cartel Laws' (2014) Journal of Antitrust Enforcement 2(2), pp. 333-362.

[14] A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement In Britain' [2008] 5(1) Competition Law Review, pp. 123-145; C Beaton-Wells and C Platania-Phung, 'Anti-Cartel Advocacy – How Has the ACCC Fared?' (2011) 33 Sydney Law Review, 735; A Stephan, 'An Empirical Evaluation of the Normative Justifications for Cartel Criminalisation' (2017) Legal Studies 34(4), pp. 621-646; E Combe and C Monnier-Schlumberger, 'Public Opinion on Cartels and Competition Policy in France: Analysis and Implications' (2019) World Competition 42(3), pp. 335-353.

felt it was only a little more serious than copyright infringement.[15] One explanation for this is that the victims of price fixing and the extent of the harm are not generally obvious. Most anticompetitive behaviour is between firms who sell to other businesses and so any overcharge is typically passed on and shared among a large number of final consumers. It is for this reason that competition law cases do not tend to be newsworthy outside of the business press.[16]

The key implication of this is that individuals' moral compass may not be equipped to recognise the wrongfulness of anti-competitive conduct, especially when that conduct involves more subtle forms of collusion than say, the bid-rigging of a procurement process. What is needed is education in the form of the advocacy and engagement activities of regulators, but also the crucial compliance training that is provided within an organisation. The businesses that tend to be at greater risk are those who either choose to not take compliance seriously, or who do not have the means to adopt a comprehensive compliance programme. While robust compliance measures can be taken at a fairly low cost[17], survey work undertaken by the UK's Competition and Market Authority (CMA) suggests there is a worrying gap in competition law awareness. In 2014 only 23% of UK businesses felt they knew competition law well, while 45% had never heard of it or did not know it at all well.[18] The study suggested very significant divergences according to the size of the business, with small and medium sized firms still in very significant danger of committing competition law infringements out of ignorance or partial understanding of the rules. Indeed, one in ten who had been in contact with competitors, reported having some discussion of price.[19]

In 2009, the UK's Office of Fair Trading (the CMA's predecessor) fined 103 construction companies for involvement in bid-rigging and in a far more common practice called *cover pricing*.[20] This is where a business does not wish to win a contract that has been put out to tender, but wants to participate so as to ensure they are involved in future tendering processes. In order to do this, they contact a competitor who is bidding for the same contract to request a *credible losing bid*. As Hviid and Stephan show, this practice has limited impact on competition unless the number of bidders is very low.[21] Nevertheless, it amounted to a serious breach of the competition law, as it was a direct communication between competitors exchanging sensitive information about pricing intentions. The UK Competition Authority at the time (The Office of Fair Trading or OFT) treated it as equivalent

[15] Ibid, Stephan 2007

[16] A Stephan, 'Cartel Criminalisation: the role of the media in the "battle for hearts and minds"' in C Beaton-Wells and A Ezrachi (eds.) *Criminalising Cartels: Unexplored Dimensions and Unforeseeable Consequences* (Hart Oxford, 2011)

[17] See for example: J E Murphy, *A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs*, (Society of Corporate Compliance and Ethics, 2010).

[18] IFF Research, *Report: UK business' understanding of competition law prepared for CMA* (26 March 2015).

[19] Ibid.

[20] OFT Decision CA98/02/2009, 'Bid rigging in the construction industry in England' 21 September 2009 (Case CE/4327-04).

[21] A Stephan and M Hviid, 'Cover Pricing and the Overreach of 'Object' Liability Under Article 101 TFEU' World Competition 38(4), pp. 507-526. 2015.

to bid-rigging in setting the fines, but these were subsequently reduced by 90% at appeal to reflect the less serious nature of the practice.[22]

At the time this author had the opportunity to interview some of the individuals involved in the practice and their lawyers. One construction company director commented,

> *"We just couldn't understand what was illegal about it. We'd been getting [cover bids] from each other for years. It was standard practice in the industry and nobody ever got harmed by it"*

There was a good understanding among these individuals about the harmful and dishonest nature of naked bid-rigging, but little comprehension of why cover pricing was also considered a serious breach of the law. Indeed, one might argue that openly withdrawing from the process instead of acquiring a cover price is more harmful to competition, because it results in all competitors knowing you do not want to win the contract, not just the one firm who is approached for the credible losing bid.[23] What was interesting about this case was the level of consternation, not just among those in the industry, but also among their legal representatives (who were not generally specialist competition lawyers). One said,

> *"The treatment of these honest businesses by the OFT is a disgrace. The fact this behaviour can amount to crime is just ridiculous".*[24]

In another UK case, competitors engaged in bid-rigging through the use of a preferred customer list that essentially divided up the market. The customers (who were all other businesses) would always get the best price from the seller whose list they were on. If they approached any of the other competitors who were party to the agreement, they would be quoted a price that was in excess of the preferred sellers cartel price. Interestingly in this case the individuals did have some awareness of competition rules. Yet despite having attended an industry body event on compliance, someone directly involved in the cartel meetings said,

> *"We knew what we were doing was wrong, but not something really bad. The customers were getting a fair price and once they knew who to get the best price from, it saved them the hassle of searching around each time they wanted to place an order. The fact we were not so squeezed on price also meant we could look after them better."*

Such justifications and perspectives are indicative of a partial understanding of competition law and also a failure to fully appreciate the scope of cartel laws. Ennis points out how a classic business school education may compound this problem. The writings of business academics like Michael Porter in the 1980s and 1990s taught managers strategies for suppressing competition and raising prices, typically without the clear caveat of antitrust

[22] See *Kier Group Plc and others v Office of Fair Trading* [2-11] CAT 3/
[23] Stephan and Hviid (n 21)
[24] This was a reference to the UK's Cartel Offence under Enterprise Act 2002, s.188.

rules.[25] Another example of this is the writings of Judith and Marcel Corstjens, who in their book *Store Wars*, describe how,

> Achieving an orderly market where competitors can make more than survival returns, is a primary business aim. Industries need to find the road from free-for-all, gloves-off war to sustainable competition. Market orientation is one such road – an uphill road with segmentation as its destination.[26]

Many of these publications are now quite old and there has been a marked improvement in the way Business Schools flag competition rules in their teachings of business and marketing strategies. Yet those managers likely to be acquiring price setting powers today will have gone through university education in the 1980s and 1990s. Also, however much one caveats business strategies with knowledge of antitrust rules, the two will remain diametrically opposed to some extent. The role of competition law is to ensure low prices and competitive pressures, while the role of marketing strategies is to find ways to reduce competition so that bigger mark-ups can be made. The two are reconciled where the higher profits reward innovation or improved service, but not where they amount to a manipulation of market conditions to suppress competitive pressures. So the challenge of compliance is not just one of education, but also of 'unlearning' dangerous strategies and balancing performance measures.

The discussion above underscores the considerable challenges faced by compliance officers in ensuring that training content is both effective and engaging for those employees involved. One compliance officer was kind enough to share some rather disheartening anonymous feedback they received on their work from target employees within their organisation,

> *EMPLOYEE 1: "The competition law training was about as memorable as all the other short courses they pile on us, on top of our regular work. You resent doing it because you're busy and it feels like a waste of your time".*
>
> *EMPLOYEE 2: "The regulatory stuff [referring to competition law] is boring, complicated and doesn't always make sense, but you don't want to ask too many questions because you know everybody in the room just wants it to end as soon as possible".*

These statements also speak of the pressures employees are typically under and of the need to create sufficient and credible space in their workloads to properly engage in compliance training activities. It also hints at the growing burden of compliance training (in many areas, not just in antitrust) more generally and the need for businesses to identify synergies and

[25] S Ennis, 'Business Strategy and Antitrust Compliance' forthcoming in Anne Riley, Andreas Stephan and Anny Tubbs (eds), *Perspectives in Antitrust Compliance* (Concurrences 2021); See for example M Porter, 'How Competitive Forces Shape Strategy' in D Asch and C Bowman (eds), *Readings in Strategic Management* (Palgrave, London 1989)

[26] J Corstjens and M Corstjens, *Store Wars: The Battle for Mindspace and Shelfspace* (Wiley 1995), p17.

holistic approaches that help prevent compliance from feeling like a burden and to avoid "compliance fatigue".

4.2 Where the cartel began with legitimate contact between competitors

Compliance risk is always heightened in industries where competitors have legitimate opportunities to meet up and exchange information lawfully. Trade associations in particular, are overwhelmingly high-risk venues for facilitating and administering anti-competitive arrangements. Examples include, the *Electrical and Mechanical Carbon and Graphite* cartel which held its meetings in the margins of the European Carbon and Graphite Association, and the *Citric Acid* cartel who used the European Citric Acid Manufacturers Association to mask many of their activates.[27] Compliance officers have to carefully manage legitimate contact between competitors, as it can take little more than a series of misjudgements for communication to fall on the wrong side of prohibitions like Article 101 TFEU and Sherman Act, s.1. The danger is less heightened when it comes to research and development, as these sorts of joint ventures and arrangements do not tend to directly involve staff with price setting powers or those who work in marketing or sales. The problem lies more where a public or industry body asks competitors to discuss topics relating to cost and price. The challenge of managing these interactions was heightened by the apparent relaxing of enforcement priorities at the beginning of the Covid-19 crisis[28] and the pressure on competition policy to take a more permissive approach towards agreements that facilitate sustainability and other environmental goals.[29] The likely permanent move to 'remote working' for many employees creates new obstacles, as it means employees have less interaction with their managers and compliance officers.

Even where discussions between competitors are deemed legitimate and lawful, any exchange of information may improve their knowledge of each other and may make both tacit and explicit collusion easier to achieve.[30] It is also difficult to draw clear 'lines in the sand' when engaging in topics that have to involve some discussion of costs. Of the creation of a manufacturing cartel that began with meetings about safety standards called for by the relevant industry body, a sales executive closely involved in the meetings said,

> *"We didn't just suddenly decide to form a cartel and probably never would have done had it not been for the [industry body]. They introduced us, encouraged us to discuss safety issues and left us to organise our own meetings. The meetings just kept going*

[27] COMP/E-23/38.359 Electrical and mechanical carbon and graphite products [2004] OJ L125/45 at 82; Citric Acid[2002] OJ L239/18 at 87.
[28] See the special Covid edition of Journal of Antitrust Enforcement (June 2020) and in particular: P Ormosi and A Stephan, 'The dangers of allowing greater coordination between competitors during the COVID-19 crisis' (2020) Journal of Antitrust Enforcement 8(2), pp. 299-301.
[29] See for example: Autoriteit Consument & Markt, *Guidelines: Sustainability agreements: opportunities within competition law* (9 July 2020); and European Commission, 'Statement on ACM public consultation on sustainability guidelines' (9 July 2020).
[30] See C Argenton, D Geradin and A Stephan, *EU Cartel Law and Economics* (OUP 2020), at I.A.1.2

and the conversations gradually wandered onto prices and sales. Before we knew it, we were discussing who we sold to and for how much. Even before it got to that stage, we got a very good sense of how to compete less aggressively. It is what you don't know about your competitors that keeps you awake at night."

The danger of slipping into a breach of competition law is also greater in relation to some forms of vertical and hub and spoke arrangements.[31] One corporate executive commented how products are often 'tweaked' by marketing teams to keep them fresh and interesting for buyers. These tweaks might include new 'seasonal editions' or variants, and small changes to certain features of the product. When these are presented to retailers with resale price recommendations, retailers will sometimes seek assurances that upon following such recommendations they will remain competitive. The correct approach here is to persuade the retailer that the changes will genuinely enhance how consumers value the product and increase their willingness to pay. But those dealing with retailers may be pressured to provide assurances, including information about the practices of other retailers they sell to, that amounts to either minimum resale price maintenance and/or a 'hub and spoke' type cartel arrangement.

The notion that infringements are not always deliberate from the outset is an important one. It is imperative for businesses to create clear 'escape routes' for employees who suddenly find themselves on the wrong side of the law. This is where clear and regular reporting procedures, oversight of activities, whistleblowing hotlines and a no-blame culture relating to inadvertent breaches of competition law are important. The challenge is how to reconcile this with the need to discipline those responsible for serious breaches of the law. One possible solution is to create a no-blame culture only in relation to those individuals who report early on and who have not gone to great lengths to hide the conduct from their employer.

Without a no-blame mechanism to report inadvertent breaches, employees are far less likely to report the breach and could find themselves in a spiral of delinquency, in that the more they do to hide their involvement, the more culpable and exposed to punishment they feel, which can just spur on further efforts to conceal what is going on.[32] Meanwhile, the infringements themselves go on for longer, thereby expanding the business' liabilities. A leading competition lawyer with experience of international cartel cases described how,

"Once they become aware they have broken the law, it is hard for them to just say, 'that's it – let's go home'. They worry about going to their boss to say they messed up. The danger they imagine they are in is already overwhelming. They also get a

[31] Hub and spoke arrangements are essentially a horizontal cartel that is facilitated by common vertical links.
[32] The term 'spiral of delinquency' is used to describe the relationship between secrecy and dishonesty by J Joshua and C Harding, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (2nd Ed OUP, 2011), p51

strange sense of camaraderie in that they feel they are in this together with the other cartel members, who they often view as good friends".

In an interview of Bryan Allison, who was imprisoned for involvement in the *Marine Hoses* cartel, he described the spirit of the cartel meetings as "almost a social occasion".[33] The role of close personal ties in anti-competitive agreements is hardly surprising. In order to ensure everyone adheres to an agreement that is not legally binding, what is required is trust through monitoring and effective personal communications. Personal relationships (that in some cases predate any cartel agreement or legitimate contact) and trustworthiness are key to the success of such arrangements.[34] Those who have had an opportunity to listen to cartel meeting recordings or read transcripts of them, might be confused for thinking they are listening to a meeting of close friends. From this author's experience of such records (most of which are not in the public domain), they are nearly exclusively a male dominated world that revolves around humour, sport, food and drink. This acts to reinforce trust between the protagonists but also creates peer pressure to stick with the agreement and not cheat or pull out. In Jaspers' study of Dutch cartel cases he quotes a director who attempted to break up his cartel,

"Again, I declare that we decided internally, with the introduction of the new Dutch competition law, to cease our activities. We did not succeed. We should have distanced ourselves from these activities. I urged this several times and was sometimes pressured by other firms to continue with the agreements".[35]

Even where individuals understand that it is in their best interest to report the behaviour, there can be serious barriers to doing so. For example, where the cartel is effective at raising profits, the individual may be receiving praise within the firm and become accustomed to being shielded from the pressures and unpredictability of competition. They may fear the personal consequences of getting caught and that could distort their judgement and perception of risk – especially where they feel confident that the arrangement is unlikely to otherwise be detected.[36] Of the prospect of putting an end to the infringement, Bryan Allison of the *Marine Hoses* cartel said,

"Would I have then gone to a law firm and said, 'This is what we have done, and I think we need some help'? I suspect I would have buried it under the carpet and hoped that nothing would ever come of it. But there again once you are in one of these things, it is virtually impossible to get out of. How do you leave something like a cartel?"[37]

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[33] M O'Kane, 'Does prison work for cartelists? – The view from behind bars: An interview of Bryan Allison by Michael O'Kane' (2011) The Antitrust Bulletin, 56(2), pp. 483-500, p487.
[34] See C Parker, 'Economic rationalities of governance and ambiguity in the criminalization of cartels' (2012) British Journal of Criminology 52(5), pp. 549-583.
[35] Jaspers (n 5) p330.
[36] RA Johnson, *Whistleblowing: When It Works – And* Why (Lynne Rienner Publishers 2002) p93; see also O'Kane (n 33), p489.
[37] O'Kane (n 33), p489.

Finally, if the business does not create effective 'escape routes' for its employees it is extremely unlikely that those individuals will seek to expose the behaviour in any other way. There is a considerable amount of stigma attached to the act of whistleblowing and the experience of the whistle blower is generally far less happy than that of the price fixer who is caught, even where they are not themselves responsible for the infringement.[38] On this question Bryan Allison said,

> *"I rather think that 'grassing people up' isn't really the done thing. Isn't that a little unethical? There is nothing could be more crazy than a convicted criminal talking about ethics, so I understand the conundrum I am in. However I really didn't feel that we could go around 'grassing people up.' I just didn't think that was on."* (sic.)

The story of Stanley Adams of Hoffman La Roche, lives long in the memory of many in the compliance world. Adams sent the European Commission a well-intentioned communication about an infringement of competition law, which was later inadvertently disclosed by them. As a consequence, Adams became bankrupt, suffered a terrible personal tragedy and was prosecuted under Swiss law for passing confidential business information to a foreigner.[39] There is considerable evidence to suggest that, in contrast to price fixers who have served time in prison, whistleblowers find it extremely difficult to find work again in their industries, as was the case for Ad Bos, an engineer who blew the whistle on a Dutch construction cartel and whose experience was portrayed in a documentary film.[40]

4.3 Crisis and the effects of 'ruinous' competition

Crisis is a very common theme in the creation of cartels. The key motivation is often to avert bankruptcy, or to prevent the deterioration of prices that are dropping rapidly in response to a contraction in demand or the decline of the industry.[41] Indeed, this can lead to some rather irrational cartel outcomes, such as that between Christie's and Sotheby's in the *Auction Houses* cartel. The Chief Executive Officer of Christie's is said to have reacted to the price fixing arrangement by saying,

> *"This seems unnecessary… [we] always follow each other's commission increases anyway. We can raise commissions without having to put our reputation at risk"*.[42]

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[38] See A Stephan, 'Is the Korean Innovation of Individual Informant Rewards a Viable Cartel Detection Tool?' in T Cheng, B Ong and S Marco Colino, *Cartels in Asia* (Kluwer 2015).

[39] Eric Newbigging, 'Hoffman-La Roche v Stanley Adams – Corporate and Individual Ethics' (1986) Cranfield University Working Paper. Available: https://dspace.lib.cranfield.ac.uk/handle/1826/471

[40] *Fiddling With Millions* (VARA 2001); On the impact of whistleblowing see: C F Alford, *Whistleblowers: Broken Lives and Organizational Power* 54 (Columbia University Press 2002). P54; WE Kovacic, 'Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels' (2001) 69 George Washington Law Review 766, p774.

[41] A Stephan, 'Price fixing during a recession: implications of an economic downturn for cartels and enforcement' (2012) World Competition 35(3), pp. 511-528.

[42] C Mason, *The Art of The Steal*, (Penguin 2004), p123.

When asked why they entered into an anti-competitive arrangement, many price fixers suggest that it was not for personal gain, but rather a matter of survival.[43] Fear of bankruptcy can have a significant distortive effect on both rational choice and on an employee's moral compass. The fact is human beings do desperate things when they fear losing their jobs and may show a willingness to engage in practices that, absent that pressure, they would not normally consider. This can impact both the way the behaviour is viewed by the price fixer and by others in the organisation.

In the *Galvanised Steel Tanks* cartel case three executives were charged with the UK's criminal cartel offence and two faced trial and were acquitted by a jury.[44] The case concerned tanks used as part of fire safety sprinkler systems in large stores, factories and warehouses. The cartel followed a very heated period of competition that, it was alleged, caused the three manufacturers to cut corners in the production of the tanks, in response to increasing pressure on their profitability. There was a fear among staff that one of the companies would eventually go bankrupt. Evidence presented in the trial suggested that those involved, entered into the cartel arrangement to stabilise what one barrister in the case described as "ruinous competition" and that safety standards of the tank were able to improve as a result. One of the witnesses working in the industry even suggested the cartel may have ultimately saved lives.[45] Another described the defendants as "heroes" because their actions in forming the cartel had helped to safeguard jobs and the future of the company.[46]

This case concerned a relatively small industry, with companies that were not of a size that would justify in-house counsel, specialist compliance officers or policies typical of larger businesses. Nevertheless, the case demonstrates how perceptions can be shaped by a period of crisis immediately preceding the cartel. In another manufacturing case, a director involved in the infringement commented,

> *"we thought we were doing some good, in stopping a price war that was causing us to make so little profit, that we were beginning to lower the quality of the product and cut after-sales service"*

In a case involving a similar industry, the price war that preceded the agreement distorted not only the individuals' perception of the conduct they were engaged in, but also their perception of the customers, in echoes of the infamous "our customers are our enemies" *Lysine* quote,

> *"Our margins were low anyway, but it felt like the customers were driving us to the ground by playing us against our competitors in a Dutch auction. We sold [a*

[43] See for example Bryan Allison's comments in O'Kane (n 33), p498
[44] *R v Stringer and Dean,* Southwark Crown Court, June 2015 (unreported)
[45] These observations are based on this author's own notes from observing every day of the trial. Stephan was involved in assisting Mr Dean's defence team.
[46] Ibid.

homogenous product] so all we could really compete on was price. How is that fair? Why didn't the buyers get fined for putting us out of business?"

It is hard to draw firm conclusions based on the crisis cartels we know about, as they may not be representative of all cartel agreements and in particular those that are less likely to be detected by competition authorities. However, they tend to be in markets where there is little or no product differentiation, which is why cartel agreements are so common around the world for products like cement and milk. Product differentiation is the process of distinguishing a product or service from others, through its characteristics, features, quality or the level of support that it comes with. It provides businesses with the scope to get an edge over their competitors and escape the ill effects of a crisis, by working to provide a better product that customers are more willing to buy. However, in some industries price competition is particularly sensitive because there is little scope for innovation or differences in quality and there is virtually no brand loyalty. So these are factors that need to feature in any risk assessment exercise undertaken for the purposes of compliance.

There is also a broader observation that can be made, however, in relation to the performance management of individual employees, divisions and subsidiaries. It is essential that target setting is done in a constructive and realistic way, as failure to do so can put the employee or group of employees in the same distortive moral space that is created by crisis in the industry. It is also crucial that greater importance be placed on complying with the law and with the organisation's compliance policy, than on meeting targets and outcomes.

4.4 Delinquency and arrogance

This is perhaps the hardest form of compliance risk to eliminate within an organisation. There are instances where despite the business investing heavily in compliance, a small number of determined employees go ahead and break the law anyway. Indeed, in some cartels the employees put as much effort into hiding their activities from others in the business, as they do hiding them from the authorities. Kolasky recalls an instance where an executive was accompanied by a compliance officer to a meeting with a foreign competitor to discuss the exchange of technical information. The executive in question staged the meeting with his counterparts as if it was the first time they had met, with the customary exchange of business cards and pleasantries—all to the satisfaction of the person overseeing his meeting. It later transpired the executive in question had been socialising, playing golf and fixing prices with this individual for years.[47]

While an infringement committed by a rogue trader is actually quite rare, it can happen within some very large and complex international businesses. What follows is an account

[47] Kolasky, "Antitrust Compliance Programs: The Government Perspective", Speech given to Corporate Compliance 2002 Conference, Practicing Law Institute, July 12, 2002, San Francisco.

from an in-house counsel who found themselves having to deal with a deliberate breach of competition law driven by arrogance and hubris:

> *"One of Company A's many businesses was involved in the sale of products to the construction industry. A cartel came to light within a very small unit in the business (as a result of a leniency application by another company). The individual in Company A's small business unit (whom I will call Mr. X) who had been personally involved in the cartel had left the company before the cartel came to light. It became apparent during the investigation that Mr.X was in fact the only person in Company A who was involved in or had knowledge of the cartel. Mr. X's job title was "[product] Sales Manager", but in fact, despite his title of "Manager", he was a relatively junior employee within Company A, being responsible for sales of [the product] within a very small territory.*
>
> *Although Mr.X had left Company A by the time of the dawn raid, he agreed to come into the company for an interview. It was clear from Company A's internal records that Mr.X had received antitrust training on many occasions, and so he was asked why – despite attending many training sessions and clearly understanding that what he did was unacceptable, he did it anyway.*
>
> *Whilst very defensive (and self-justifying) in his replies, it became apparent that Mr.X felt a personal grudge against Company A and his own boss: he felt a lack of recognition for (what he wrongly considered were) his many talents. He thought that the company "owed him something" as he felt he had been passed over for promotion.*
>
> *In his own words (and without any trace of remorse or recognition of wrong-doing) he decided to "enjoy himself" by organising dinners and golf outings with direct competitors – in which they could fix the price of [the product in the territory]. His motivation was not to increase profits for Company A – indeed rather the reverse – he maliciously hoped that his actions would harm Company A, and he felt he could do so without any personal consequences, as he was shortly to retire."*

The author of this account identified two key learnings from their experience of this case: (i) Senior and middle management need to maintain better oversight of the activities of employees who report to them. This may be particularly important in small business units in a large organisation, where the problems may occur far from HQ locations; and (ii) A better review (and audit) of business expenses would have allowed earlier challenge – especially where expenses are incurred relating to social events where competitors are present.

So the risk of the rogue trader is probably best managed through rigorous and effective systems of oversight and monitoring which make it very difficult for such behaviour to go undetected for very long. This can be hugely challenging and costly for businesses, but there are a variety of reasons why individuals who have completed regular compliance training,

go on to participate deliberately in anticompetitive behaviour anyway. Crisis, greed, hubris, arrogance are just some of the possible drivers.

Two factors undermine compliance efforts and risk emboldening this category of behaviour. The first is the design of the law. There appears to be a consensus among compliance officers that there should be a threat of sanctions against the individual as well as the company, if compliance training is to be taken seriously by such individuals. Also, as is evident in various studies, the frequency of cases and probability of getting caught are important drivers for desistance.[48] So in a jurisdiction where there are no individual sanctions, or in the UK where there is a criminal offence that has been all but abandoned, it is hard to ensure employees take the consequences of breaching competition law seriously. On this issue, Bryan Allison said,

> *"I knew from the legislation coming in, in 2003, that it was a criminal offense in the United Kingdom and that an individual could go to jail. But again I hadn't thought anything would really happen. We had gone four years from 2003 to 2007 without any prosecution of anybody. Why would anybody, and the OFT seemed to be primarily concerned with consumer rather than trade or industry type issues, prosecute us? …it was that aura of invincibility—why would anyone want any involvement in what we were doing?"*[49]

The second important factor is that the company is consistent in its compliance policy and in particular in its condemnation of anti-competitive behaviour. There are fairly recent instances of firms taking a mixed approach. A good example of this was the *Passenger Fuel Surcharge* case in the UK involving British Airways. While the airline did not dispute the existence of an infringement of competition law and was keen to settle the administrative public enforcement case against them, they retained the employment of an individual charged under the UK's cartel offence and even promoted him while he was awaiting trial.[50] Another charged with the offence was appointed to a top-level job in UK private care provider, Bupa, at a round the same time.[51] The criminal trial itself collapsed and while BA may have felt the criminal indictments were disproportionate, the act of promoting one of the individuals allegedly involved, risked sending a rather mixed compliance message within the organisation. Openly rewarding individuals responsible for an infringement or who failed to stop it – albeit ostensibly for their non-cartel related achievements – does not appear to be that uncommon and is not compatible with effective compliance.[52]

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[48] See for example A Chalfin and J McCrary, 'Criminal Deterrence: A Review of the Literature' (2017) Journal of Economic Literature, 55(1), pp.5-48.
[49] O'Kane (n 33), p488.
[50] M Peel, 'BA sales chief on price fixing charge to join the board' *Financial Times*, 28 November 2008. The trial subsequently collapsed and the individual was never convicted of the offence.
[51] R Lea, 'Bupa job for BA chief in price-fix scandal' *Evening Standard*, 2 December 2008.
[52] See for example: Robert Wiseman Dairies, *2008 Annual Report*, in which bosses were awarded major bonuses despite the firm incurring a £6.1 million fine in the pervious year for price fixing.

4.5 Regional Sales Staff

Cartels are typically set up and administered by those with price setting powers.[53] This means that the individuals involved are typically either the heads of divisions or subsidiaries within an organisation, or responsible for sales at the other end of the process.[54] While sales employees do not necessarily have price setting powers, they enjoy considerable discretion to grant discounts, quantity rebates and other tools to secure sales. Indeed, it is sometimes necessary for the cartel to instruct them to not act, because their tendency to reduce the price and sell more, defeats the efforts of the cartel to exert a monopoly price.[55] The majority of cartels that involve sales staff are coordinated by senior management, but a particular risk of sales staff breaking competition law arises where their job involves travel and regular meetings with customers in a regional setting. In one such cartel, a competition lawyer recounts a statement made by one of the sales staff in an internal interview,

> *"In this job you see more of your competitors than you do people from your own company. You stay in the same hotels, get the same trains, and sometimes even see each other in the customer's reception lobby. It's hard not to get to know these people, have a drink with them, join their table for breakfast. When that happens what do you talk about? Your customers of course. You make proper friendships and that means a lot when your work is lonely. It's hard to control what you talk about – even if it is just to talk trash about dealing with the customers".*

Given the movement to sales that are based more on digital interactions, it is hard to say how prevalent this scenario still is. It does, however, illustrate a broader point about employees who do not feel closely connected to others in their organisation because of the nature of their work. The increase in remote working brought on by the Covid-19 crisis may signal an increased risk of such outcomes. One might also think of other jobs where interactions with competitors are hard to avoid.

5. Leniency and Settlement Programmes

Modern cartel enforcement owes much of its success to the use of leniency programmes. These provide immunity to the first firm to come forward and report an infringement. In jurisdictions where there is a criminal offence, that immunity extends to the company's employees. Subsequent firms to come forward also get some reward, usually in the form of reduced fines and sentences administered through a formal leniency policy, or through plea bargains in the case of the US. Around two thirds of cartels investigated in the EU now

[53] They can also be administered by those who control production quantities rather than price.
[54] A Stephan, 'See no evil: cartels and the limits of antitrust compliance programmes' (2010) The Company Lawyer 31(8), pp. 3-11, at 7-8.
[55] *R v Stringer and Dean* (n 44)

involve at least one leniency application.[56] In more recent years, jurisdictions have sought to replicate the benefits of the US plea bargaining system (which does not exist in most legal traditions), by also adopting settlement programmes. These provide parties with an additional discount in fines in return for them not contesting the case and agreeing to a streamlined procedure.

While systems of leniency and settlement have undoubted success at uncovering infringements that would otherwise go undetected, they create some unhelpful distortions for corporate compliance. It is important to note that the decision to apply for leniency is not taken lightly and those with experience of uncovering potential liability will know that the 'race to the competition authority'[57] is not always a fair or accurate characterisation. Indeed, in a survey conducted by Sokol of 234 US antitrust lawyers, more than half said that in the previous two years at least one client had come to them with hard-core cartel issues that did not go on to be investigated by the US government.[58]

The particular distortion that these programmes create relates to the treatment of individuals responsible for the breach in competition law. Often the individuals responsible for the cartel have retired or left the company by the time the infringement is discovered. However, where they are still within the firm and assuming it can genuinely be said that these individuals went against compliance training and company policy, the instinct to reprimand or dismiss them can quickly run counter to the businesses' immediate concern, which will be to maximise any benefit available under leniency and plea bargaining or settlement. Acting swiftly could make the difference between getting immunity, or a 50% discount in fine, or only a much smaller reduction if other members of the cartel are already cooperating with the competition authority. Limiting liability and exposure on capital markets will also likely be shareholders' primary concern at this stage.

In order to ensure a leniency application is successful (especially if you are a multinational dealing with multiple leniency fillings in many jurisdictions), businesses require as much information about the infringement as possible. Given the secretive nature of cartel arrangements and the great care they take to cover their footprints, it is often the case that the most effective and expedient way of getting this information is by enlisting the cooperation of the manager(s) responsible. Those individuals may only be willing to cooperate where they get certain assurances about their employment, pension and related benefits.[59] They may also ask that the firm covers all their related legal costs (where that is permitted in the relevant jurisdiction), including those connected with any individual

[56] A Stephan and A Nikpay, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities' in C Beaton-Wells and C Tran (eds.), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion* (Hart Publishing 2015).
[57] J Vickers, 'Competition Economics', Speech delivered to Royal Economic Society annual public lecture. Royal Institute, London. 4 December 2003.
[58] D. Daniel Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement' (2012) 78(1) Antitrust Law Jounal, 201.
[59] P. Whelan, The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges (Oxford University Press, 2014), p.133.

sanctions. Indeed, this may explain why companies sometimes appear to retain the employment of those responsible and even reward them.

Leniency programmes also typically create an obligation on the business to do what they can to ensure the cooperation of current and former employees. This is true of the European Competition Network's Model Leniency Programme[60] and also of the US Department of Justice, which has in the past stated that, 'the number and significance of the individuals who fail to cooperate, and the steps taken by the company to secure their cooperation, are relevant in the Division's determination as to whether the corporation's cooperation is truly "full, continuing and complete"'.[61]

A further incentive to keep those responsible within the firm, is created by the Antitrust Criminal Penalty Enhancement Reform Act of 2004 (ACPERA). This addresses the possible disincentive for self-reporting under the Department of Justice's Leniency Policy, where there is fear of being exposed to significant follow-on actions for treble damages. The legislation reduces the exposure for the revealing firm to single damages, among other protections. One of the requirements created by the act is the corporate amnesty applicant uses its 'best efforts' to secure the testimony of individuals 'covered by the [leniency] agreement', which might include facilitating their cooperation by covering their legal expenses.[62] This provides those responsible for the infringement further leverage to push back against efforts to discipline or dismiss them. In principle, these firms could attempt to show best efforts despite the fallout of any internal disciplinary action, but the main priority will be to avoid or minimise the exposure to financial penalties and follow-on damages.

These sorts of obligations manifest themselves in leniency and settlement procedures around the world but are particularly stark in the US because of the nature of how plea bargains are negotiated. A common theme is the pressure on firms to encourage their current and former employees to enter a plea bargain with the US Department of Justice, in order to assist them in negotiating a reduced corporate fine in the same criminal investigation. The lengths that some businesses will go to is illustrated by an anonymised interview published in *Automotive News* in 2014 with a Japanese executive who had agreed to serve gaol time in the US for a price fixing conspiracy, under a plea bargain arrangement.[63] The individual claimed his employer had promised 'to support me for the rest of my life' if he agreed to go to gaol, in order to assist the firm in negotiating a lower corporate fine. They also indemnified the $20,000 criminal fine that came with the prison sentence and promised to ensure his family were looked after financially for its duration.

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[60] See for example the European Competition Network's Model Leniency Programme. Available: https://ec.europa.eu/competition/ecn/model_leniency_en.pdf (accessed 19 March 2021)

[61] G R Spratling (Deputy Assistant Attorney General, Antitrust Division), 'The Corporate Leniency Policy: Answers to Recurring Questions' speech to the ABA Antitrust Section Spring Meeting, Washington, D.C., 1 April 1998.

[62] See M D Hausfeld *et al,* 'Observations from the Field: ACPERA's Firsts Five Years' (2009) The Sedona Conference Journal, 10, pp.95-114, p109-10, citing ACPERA Sections 213(b)(3)(B)

[63] H Greimel, 'Confessions of a price fixer' *Automotive News* (16 November 2014).

As Stucke points out, leniency and settlement programmes pose a broader problem in that they 'undercut the moral outrage from price-fixing'.[64] Many see an inherent injustice in the employees of the immune firm being entirely unaffected by an investigation that potentially results in others involved in the same infringement serving time in gaol. On this point, Bryan Allison said,

> *"it doesn't seem right that by dumping everybody else in the mud you can get away with it. Especially when, clearly in some of these incidents, the people that have gone to the authorities in the first place were by far the most culpable participants in this illegal activity. If you take it to pure criminal law, if the leader of a gang of armed robbers reports all his colleagues and gets away with it, is that right? When he set about instigating the crime, working out what they were going to do? I suspect the public wouldn't think much of that. And yet in cartel activity it's accepted because it's the only way the authorities can break it."* [65]

The relationship between leniency, enforcement and compliance is therefore a complicated one. The availability and regular imposition of individual sanctions of some form can be of great benefit to compliance officers, in helping them ensure employees engage with the training and feel there are some personal consequences to breaking competition law. Yet once an infringement has occurred, the availability of leniency can make it difficult to discipline those individuals internally if their cooperation is needed to ensure a good outcome for the firm.

In many ways, the active enforcement of sanctions against individuals offers a possible solution to this quagmire, in that punishment and deterrence is served even if the business' desire to discipline those responsible is frustrated. These sanctions may take the form of a criminal offence, individual civil fines, or other tools such as director disqualification.[66] However, in the absence of a US style system of plea bargains, criminal cartel convictions have proven both difficult to secure and may pose a chilling effect on employee's willingness to cooperate.[67]

6. Conclusion

This paper has provided a critical analysis of the challenges to antitrust compliance, from the perspective of the price fixer. It suggests that the motivation for entering into a cartel

[64] M E Stucke, 'Am I a Price-Fixer? A Behavioural Economics Analysis of Cartels' in C Beaton Wells and A Ezrachi (eds.) *Criminalising Cartels: A Critical Interdisciplinary Study of an International Regulatory Movement* (Hart 2011).
[65] O'Kane (n 33), p491.
[66] See P Whelan, 'The Emerging Contribution of Director Disqualification in UK Competition Law' in A MacCulloch, B Rodger and P Whelan (eds), *The UK Competition Regime: A Twenty-Year Retrospective,* (OUP forthcoming, 2021).
[67] See Stephan (n 13)

arrangement is often more complicated than a rational choice driven by greed. In particular, ignorance still appears to be a major obstacle to compliance, especially among smaller and medium sized firms who do not have the resources to undertake significant compliance efforts and who may have little if any understanding of competition law. Even where the price fixers have undertaken some compliance training, the quality and extent of their understanding of the law may vary widely. Cartel infringements may also come about as a consequence of legitimate contact between competitors, serious crisis within the industry or a period of very heated competition. These create an ambiguous moral space in which it is harder to recognise wrongdoing. It can also create clear justifications in the minds of the price fixer, of why the conduct is acceptable. These might include the fact an industry body or public authority encouraged the competitors to initially talk to each other (albeit for legitimate reasons), other job roles that involve close proximity or frequent interaction with competitors, or where there is a serious fear of bankruptcy or job loss. Despite even the most far-reaching compliance programme, there will always be a clear danger that the price fixer makes a very deliberate decision to engage in wrongdoing out of arrogance, greed or hubris, in complete disregard for the law and their employer's compliance programme.

These perspectives and in particular the quotes presented in this paper, should be interpreted with some caution. Some are unverified accounts that could be skewed to deflect or manage responsibility. They are also from what is far from a representative sample of all cartels and give an insight into only a small number of the cartels that were detected. We still know very little about those cartels that are not. Despite these limitations, the study provides an important insight that furthers our knowledge of why cartels occur and how corporate compliance efforts can prevent them. The findings suggest that ongoing education and training is fundamental, both within the business and more widely in society through the advocacy efforts of competition authorities. This is especially important given how some managers may need to 'unlearn' business strategies that raise serious antitrust risk, and the low level of awareness and moral opprobrium that smaller businesses and members of the public still attach to cartel conduct. Clear mechanisms for reporting inadvertent breaches of competition law can be effective if they are on a no-blame basis, where the employee reports it at an early opportunity and has not made efforts to hide their involvement. This is especially important in detecting infringements that have come about because the employee is not sufficiently alert to the dangers of the situation and preventing a descent into a spiral of cartel behaviour. Businesses also need to be consistent in their compliance message, closely monitor all interactions with competitors, and avoid pushing employees into that morally ambiguous space – for example by creating unrealistic performance expectations.

The biggest challenge businesses face is reconciling the need to discipline employees who ignore the compliance programme, with the need to ensure any infringement is detected quickly and reduce liability through the successful engagement with leniency and settlement procedures. The well-designed use of individual sanctions by competition

authorities can help businesses in this respect, by ensuring those responsible are punished even if compromises need to be made by the business in relation to their internal disciplinary procedures, in the interests of cooperating with the cartel investigation. Sanctions that are regularly imposed on individuals in cartel cases, may also be the only way of deterring those employees who engage in deliberate breaches of the law, in clear disregard their employer's compliance programme. This group is unlikely to be deterred at present in jurisdictions that rely overwhelmingly on corporate fines alone to deter cartels.

More on Federal Criminal Investigations and Search Warrants

ANTITRUST INVESTIGATIONS

Organization of the Department of Justice

40 C.F.R. § 40(a)

The following functions are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Antitrust Division:

(a) General enforcement, by criminal and civil proceedings, of the Federal antitrust laws and other laws relating to the protection of competition and the prohibition of restraints of trade and monopolization, including conduct of surveys of possible violations of antitrust laws, conduct of grand jury proceedings, issuance and enforcement of civil investigative demands, civil actions to obtain orders and injunctions, civil actions to recover forfeitures or damages for injuries sustained by the United States as a result of antitrust law violations, proceedings to enforce compliance with final judgments in antitrust suits and negotiation of consent judgments in civil actions, civil actions to recover penalties, criminal actions to impose penalties including actions for the imposition of penalties for conspiring to defraud the Federal Government by violation of the antitrust laws, participation as amicus curiae in private antitrust litigation; and prosecution or defense of appeals in antitrust proceedings.

[*Subsequent sections omitted*]

United States Attorneys Manual

7-5.300 - Antitrust Grand Jury Investigations

Pursuant to 28 C.F.R. Sec. 0.40(a), the Assistant Attorney General in charge of the Antitrust Division must authorize any grand jury investigation of possible antitrust violations. Consultation with the Deputy Assistant Attorney General for Criminal Enforcement or the local field office may be desirable at the time the United States Attorney's Office is formulating a request for grand jury authorization.

Memorandum

Subject	Date
Request for FBI Assistance: [Commodity] Grand Jury Investigation [(District)] -- [(City and State in which the GJ is sitting)]	[DOJ File Number]

To Nancy Nelson, Chief
Public Integrity in Government/
Civil Rights Section
Criminal Investigative Division
Federal Bureau of Investigation

Attn: Mike Anderson, Chief
Public Corruption/
Governmental Fraud Unit

From Marc Siegel
Director of Criminal Enforcement
Antitrust Division

I. Introduction

The Antitrust Division is conducting an investigation of [offense--bid rigging, price fixing, customer allocation, etc.] among [who--distributors, bidders, etc.] of [commodity] in [city, state]. We request FBI assistance on all phases of the investigation. Initially, we request agent assistance in [interviewing possible witnesses, consensual monitoring, etc.]. [Name(s) of attorney(s)], trial attorney(s) in the [name of office or section], [telephone number(s)], [has/have] been assigned to this matter.

II. Synopsis Of Allegations

[Note: Your synopsis should be one or two paragraphs.]

Subjects of the investigation include:

Corporations

[Corporation Name, City, State
Corporation Name, City, Country]

Individuals

[Name, Position, Corporation, Location]

III. Possible Federal Violations

The conduct alleged here could possibly be prosecuted under [appropriate statutes, e.g., 15 U.S.C. § 1, 18 U.S.C. § 1341, 18 U.S.C. § 1343, etc.].

IV. Judicial District

Any charges arising from this investigation would likely be filed in the [district] in [city where the grand jury is sitting].

V. Other Investigatory Agencies

We do not anticipate that any other investigatory agencies will participate in the investigation of this matter [or if you anticipate another agency's participation, list the agency and describe its role in the investigation].

VI. Conclusion

FBI support would be of substantial assistance to the Division in investigating this alleged violation. If this investigation yields sufficient evidence of a criminal violation, the Division will prosecute the matter.

1. Standards for Determining Whether to Proceed by Civil or Criminal Investigation

Many investigations conducted by the Division are clearly civil investigations (*e.g.*, merger investigations). Nevertheless, there are some situations where the decision to proceed by criminal or civil investigation requires considerable deliberation. In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations. Civil process and, if necessary, civil prosecution is used with respect to other suspected antitrust violations, including those that require analysis under the rule of reason as well as some offenses that historically have been labeled "per se" by the courts. There are a number of situations where, although the conduct may appear to be a per se violation of law, criminal investigation or prosecution may not be appropriate. These situations may include cases in which (1) the case law is unsettled or uncertain; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.

During the preliminary investigation stage of the investigation, staff makes the determination on whether to conduct the remainder of the investigation as a grand jury or CID investigation. In general, however, the nature of the suspected underlying conduct should determine the nature of the investigation. Thus, when the conduct at issue appears to be conduct that the Division generally prosecutes in a criminal case, the investigation should begin as a criminal investigation absent clear evidence that one of the complicating factors that might make the case inappropriate for criminal prosecution is present. Where it is unclear whether the conduct in question would be a civil or criminal violation, the DAAG for Operations and the relevant Director of Enforcement should be consulted before any decision is made concerning the nature of the investigation. Among other things, early Front Office involvement might result in a decision that certain conduct is inappropriate for criminal prosecution. Alternatively, staff might be instructed to continue its preliminary investigation but to focus on facts that might be relevant in determining whether a grand jury should be convened.

The decision to convene a grand jury has several consequences, including restrictions on how the Government can use certain evidence gathered during the course of the grand jury's investigation. In *United States v. Sells Engineering, Inc.,* 463 U.S. 418 (1983) and *United States v. Baggot*, 463 U.S. 476 (1983), the Supreme Court restricted the Government's ability to use evidence gathered during the course of a grand jury investigation in a subsequent civil case. In *Sells*, the Court held that Federal Rule of Criminal Procedure 6(e) prohibits the disclosure of grand jury materials to Department of Justice attorneys

who were not involved in the grand jury proceedings unless the Government obtains a court order based on a showing of particularized need. However, the Court expressly declined to address "any issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." *Sells*, 463 U.S. at 431 n.15. However, the Court resolved that issue in *United States v. John Doe, Inc.*, 481 U.S. 102 (1987). There, it held that an attorney who conducted a criminal prosecution may make continued use of grand jury materials in the civil phase of the dispute without obtaining a court order to do so under Rule 6(e) and "Rule 6(e) does not require the attorney to obtain a court order before refamiliarizing himself or herself with the details of a grand jury investigation." 481 U.S. at 111.

2. Planning the Investigation

At the beginning of any investigation, staff should immediately determine the scope and focus of its investigative effort. Planning sessions should take place at the time the preliminary investigation memo is being drafted, and the preliminary investigation memo should describe the initial investigative approach. At this early stage, the chief and the legal and economic staff should establish a plan describing what is to be done, how and when it will be done, and who will do each task. All investigation plans should address, at least, candidate theories of competitive harm; evidence that would support each theory, and from where the evidence could be obtained; the specific tasks that are necessary to obtain the necessary evidence; when staff plans to accomplish those tasks; and which staff members will be primarily responsible for those tasks. The most effective investigations are very often the result of carefully planned strategies that are well developed at the outset of the investigation. These investigative plans should be submitted to the DAAG for Operations and the appropriate Director of Enforcement. The DAAG for Operations will coordinate a Front Office response to the investigative plan, including providing to staff the name of the Assigned DAAG. Staff should tailor its investigative plan based on the information available to it at the start of the investigation. Often staff will be able to quickly determine, for example, that a proposed merger raises little or no competitive concern. In these circumstances, staff should work to pinpoint any competitive concerns and to resolve the matter as quickly and efficiently as possible. Staff may be presented with a set of facts that leave few issues to be resolved; in these circumstances, staff's investigative plan should be centered around resolving those issues. When staff is presented with competitive concerns that warrant a more in-depth investigation, staff should quickly adapt its investigative plan to obtain the additional information that will be required to resolve the matter.

For example, in a civil investigation, thought should be given as to how best to elicit different types of information—from interviews,

depositions, documents, or interrogatories—as well as what economic evidence, and what support from EAG, is needed. The plan should provide for early development of relevant legal and economic theories and a determination of the relief to be sought. The key premise of investigative planning is that, from the outset of an investigation, staff's theory of the case is well defined, although with some flexibility warranted to account for the possibility that developing additional facts or analysis will disclose a theory that had not previously been considered fruitful.

In most instances, the plan should include drafting an outline of proof. An outline of proof is a living document prepared jointly by the legal and economic staff that should be revised regularly as the factual underpinnings of the case come into focus. For civil nonmerger cases, this outline will normally start with a recommendation outline and end in findings of fact. In merger cases, the outline should provide the evidence for each element of the Merger Guidelines with highlights from the best documents, depositions, or affidavits. It should also include an evaluation of the merging parties' arguments, including their legal and economic theories and the evidence preferred to support them.

For merger investigations, staff must be mindful of time constraints. Staff must balance the usefulness of each proposed task against the opportunity cost of the time the proposed task will consume as a proportion of the time left before the waiting period or timing agreement expires. For example, staff may wish to obtain large amounts of data that will allow for a very thorough evaluation of the proposed transaction, but should be aware of potential consequences of this approach: *e.g.*, producing significant amounts of data often takes a long time, staff could end up with only a short period of time to process the information, and staff could be left with insufficient time to complete even the most basic tasks. On the other hand, if staff obtains too little information, the Division may not have enough facts to sufficiently analyze the proposed transaction and make an enforcement decision.

For civil nonmerger investigations, staff should submit an investigative schedule to the Front Office shortly after the preliminary investigation is opened, typically within one week. The investigative schedule should set target dates for recommending, issuing, and receiving discovery; for status meetings; and for recommending and deciding whether to pursue a civil action. Each plan should be carefully tailored to the investigation and target dates should be established on a case-by-case basis. Each plan must be approved by the DAAG for Operations and the Director of Civil Enforcement. In addition, staff must obtain approval from the DAAG for Operations, and the Assigned DAAG, on all modifications to the investigative schedule. Approvals will be coordinated by the Director of Civil Enforcement or the appropriate special assistant.

Investigating antitrust violations is a multi-stage process, and staff's investigative plan should be a "living" document. Staff should ensure that it updates the focus of its investigative plan at each stage of the investigative process. As the investigation develops, staff should expand its investigative plan to more completely address all of the potentially relevant issues, such as staffing needs, whether to hire technical or economic experts, and possible remedies. In addition, staff should ensure that its investigative plan is informed by ongoing discussions among staff and section management about staff's current substantive analysis. In civil matters, staff should consult with the economist assigned to the investigation and should include EAG's perspective in developing and pursuing the investigation. Moreover, in civil matters, staff should engage the parties in discussion early in the investigation, obtain the parties' substantive evaluation of the matter, and share its own substantive evaluation with the parties. An ongoing critical analysis of a proposed transaction and a transparent discussion of that analysis can lead to a quicker and more effective process of arriving at the ultimate enforcement decision.

Resources available to staff in commencing the investigation are outlined in Chapter VI, Part B. That part of the manual provides detail about the Division's investigatory techniques and procedures, including use of economic resources, data processing and other information retrieval methods, and other source materials that have proven useful in investigation and litigation efforts.

3. Obtaining Assistance

a. Federal Agencies

During the course of the preliminary investigation, staff may require assistance in conducting interviews of industry officials, locating individuals whose whereabouts are unknown, compiling statistical data, or performing various other investigative functions. When such assistance is necessary, staff should consider requesting the services of other Federal agencies.

i. Federal Bureau of Investigation

To obtain FBI assistance, staff, with the concurrence of the chief, should prepare a Request for FBI Assistance. The Request should be sent via e-mail to the ATR-CRIM-ENF mailbox with a cc:/ to the appropriate special assistant. Staff must submit a Request for FBI Assistance even when the local office of the FBI has indicated that it will assist staff or when staff plans to use the FBI agent detailed to the field office.

The DAAG for Operations and the Director of Criminal Enforcement review and approve the memo before sending it to FBI Headquarters. Once FBI Headquarters has processed the request and assigned it to the appropriate FBI office (a routine request takes about ten working days), the agent assigned to the matter will contact staff directly and begin the

investigation. After the initial request is made and an agent is assigned, further requests for assistance may be made directly to the assigned agent.

If staff requires FBI assistance to perform a criminal records search in connection with trial preparation and the FBI has not previously participated in the investigation of the matter, then a memorandum from the Division's Director of Criminal Enforcement must be sent to the Federal Bureau of Investigation International Corruption Unit. The memorandum should include the following sections:

- Introduction. A statement requesting assistance in conducting a criminal records check of defendants and potential witnesses in connection with a trial. The statement should include the following information: the name of the case, the criminal number, the judicial district, the date the trial is expected to begin, the date the results of the FBI check are needed, and the name and phone number of the contact person at the Division.
- The Indictment. A brief statement of the charges in the indictment and when the indictment was returned.
- Identifying Information. A list of the defendants first and then the witnesses (each in alphabetical order) with the following identifying information: name, address, country of citizenship, Social Security number, and date of birth. If a defendant is a company, indicate after the company name the name of a high-ranking official (*e.g.*, owner, president, CEO) with the identifying information listed above for that person.

ii. Other Federal Agencies

If an investigation involves procurement by a Federal agency such as the Department of Defense, staff should consider seeking the assistance of the Inspector General's Office for the agency. Inspector General agents have proven to be helpful in collecting and analyzing bid or pricing data, interviewing potential witnesses, and helping Division attorneys to understand a particular agency's procurement system and regulations. No special Division procedures are required for obtaining the assistance of Inspector General agents, and each section or field office should make whatever arrangements are appropriate directly with the Inspector General's office for the agency involved. If questions or problems arise, however, staff should discuss the matter with the Assigned DAAG and the appropriate Director of Enforcement.

Before contacting an agency with which the Division has a regular relationship, staff should contact the section within the Division with that regular relationship to coordinate contacts with that agency. For example, contact with the Department of Defense in any civil matters should be coordinated through the Litigation II section. For additional information on dealing with the Department of Defense, *see* Chapter

VII, Part E.2 and E.3, especially with respect to the Division's obligations to report individual defendants qualifying for debarment under 10 U.S.C. § 2408. Before making contact with any foreign entities, staff should coordinate with the Division's Foreign Commerce Section. For example, if staff would like to conduct a third-party interview with foreign national or corporation, staff should first contact the Foreign Commerce Section to obtain clearance.

b. Non-Federal Agencies and Other Entities

The Division has developed strong relationships with a number of antitrust enforcement agencies and with relevant entities throughout the United States and the world. For additional information on consultation with non-Federal agencies and other entities, *see* Chapter VII.

4. Obtaining Information by Voluntary Requests

DUE PROCESS

U.S. Constitution amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation. [Emphasis added]

FEDERAL RULES OF CRIMINAL PROCEDURE

SEARCH AND SEIZURE

Rule 41. Search and Seizure

(a) Scope and Definitions.
- (1) *Scope*. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.
- (2) *Definitions*. The following definitions apply under this rule:
  - (A) "Property" includes documents, books, papers, any other tangible objects, and information.
  - (B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.
  - (C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.
  - (D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.
  - (E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) *Venue for a Warrant Application*. At the request of a federal law enforcement officer or an attorney for the government:
- (1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;
- (2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;
- (3) a magistrate judge—in an investigation of domestic terrorism or international terrorism—with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district;
- (4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both; and
- (5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia,

may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises—no matter who owns them—of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

(c) *Persons or Property Subject to Search or Seizure*. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) *In General*. After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.

(2) Requesting a Warrant in the Presence of a Judge.

(A) *Warrant on an Affidavit*. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) *Warrant on Sworn Testimony*. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) *Recording Testimony*. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) *Requesting a Warrant by Telephonic or Other Reliable Electronic Means*. In accordance with Rule 4.1, a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

(e) Issuing the Warrant.

(1) *In General*. The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) *Contents of the Warrant.*

(A) *Warrant to Search for and Seize a Person or Property*. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 14 days;

(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

(B) *Warrant Seeking Electronically Stored Information*. A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(C) *Warrant for a Tracking Device*. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

(A) *Noting the Time*. The officer executing the warrant must enter on it the exact date and time it was executed.

(B) *Inventory*. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

(C) *Receipt*. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

(D) *Return*. The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. The officer may do so by reliable electronic means. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) Warrant for a Tracking Device.

(A) *Noting the Time*. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) *Return*. Within 10 days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant. The officer may do so by reliable electronic means.

(C) *Service*. Within 10 days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that

location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) *Delayed Notice*. Upon the government's request, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—may delay any notice required by this rule if the delay is authorized by statute.

(g) *Motion to Return Property*. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) *Motion to Suppress*. A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.

(i) *Forwarding Papers to the Clerk*. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

UNITED STATES DISTRICT COURT

for the

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person by name and address)*	)))))))	Case No.

APPLICATION FOR A SEARCH WARRANT

I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjury that I have reason to believe that on the following person or property *(identify the person or describe the property to be searched and give its location):*

located in the _____ District of _____ , there is now concealed *(identify the person or describe the property to be seized)*:

The basis for the search under Fed. R. Crim. P. 41(c) is *(check one or more)*:

- ❒ evidence of a crime;
- ❒ contraband, fruits of crime, or other items illegally possessed;
- ❒ property designed for use, intended for use, or used in committing a crime;
- ❒ a person to be arrested or a person who is unlawfully restrained.

The search is related to a violation of:

Code Section	*Offense Description*

The application is based on these facts:

- ❒ Continued on the attached sheet.
- ❒ Delayed notice of _____ days (give exact ending date if more than 30 days: _____) is requested under 18 U.S.C. § 3103a, the basis of which is set forth on the attached sheet.

_____
Applicant's signature

_____
Printed name and title

Sworn to before me and signed in my presence.

Date: _____

_____
Judge's signature

City and state: _____

_____
Printed name and title

UNITED STATES DISTRICT COURT

for the

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person by name and address)*	)))))))	Case No.

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the _____ District of _____
(identify the person or describe the property to be searched and give its location):

The person or property to be searched, described above, is believed to conceal *(identify the person or describe the property to be seized)*:

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property.

YOU ARE COMMANDED to execute this warrant on or before _____
(not to exceed 14 days)

❒ in the daytime 6:00 a.m. to 10 p.m. ❒ at any time in the day or night as I find reasonable cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to United States Magistrate Judge

_____ .
(name)

❒ I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized *(check the appropriate box)* ❒ for _____ days *(not to exceed 30).*

❒ until, the facts justifying, the later specific date of _____ .

Date and time issued: _____ _____
Judge's signature

City and state: _____ _____
Printed name and title

Return		
Case No.:	*Date and time warrant executed:*	*Copy of warrant and inventory left with:*
Inventory made in the presence of :		
Inventory of the property taken and name of any person(s) seized:		

Certification

I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.

Date: _____

_____
Executing officer's signature

_____
Printed name and title

F. Conducting a Grand Jury Investigation

Many of the procedures set forth below vary by judicial district. When unfamiliar with local practice, staff should consult with the appropriate field office or U.S. Attorney's Office. Before a staff initiates a grand jury investigation or consults with a U.S. Attorney's Office about the initiation of a grand jury investigation in a judicial district in the territory of another field office, staff should notify the chief of that office.

1. Requesting a Grand Jury Investigation

Consistent with the standards developed in Part C.1. of this chapter on whether to proceed by criminal or civil investigation, staff should consider carefully the likelihood that, if a grand jury investigation developed evidence confirming the alleged anticompetitive conduct, the Division would proceed with a criminal prosecution. To request a grand jury investigation, staff should prepare a memorandum on behalf of the section or field office chief to the DAAG for Operations, the Criminal DAAG, and the Director of Criminal Enforcement detailing the information forming the basis of the request. That information may be based on the results of a preliminary investigation or a CID investigation, but often information received from a complainant provides a sufficient basis for the request without conducting a preliminary investigation. The request for grand jury authority should, to the extent possible:

- Identify the companies, individuals, industry, and commodity or service involved.
- Estimate the amount of commerce involved on an annual basis.
- Identify the geographic area affected and the judicial district in which the investigation will be conducted.
- Describe the suspected criminal violations, including nonantitrust violations, and summarize the supporting evidence.
- Evaluate the significance of the possible violation from an antitrust enforcement standpoint (*see* Chapter III, Part B.1.).
- Explain any unusual issues or potential difficulties staff has identified.
- Identify the attorneys who will be assigned to the investigation.
- Explain the background of the investigation, including the source of the information.
- Explain the initial steps in staff's proposed investigative plan.
- State whether there have been any criminal investigations by the Division of the product or service that is the subject of the grand jury request.

Staff should forward the grand jury request memorandum to the field office chief for review. If approved by the chief, the grand jury request memorandum should be e-mailed to the ATR-CRIM-ENF and ATR-Premerger-GJ Request mailboxes with a cc:/ to the appropriate special assistant in Operations. Send the appropriate MTS form (the "New Matter Form" (ATR 141) if a preliminary investigation was not authorized or a preliminary investigation was authorized and will remain open, or the "New Phase Form" (ATR 142) if a preliminary investigation was conducted, the investigation is being upgraded to a grand jury

investigation, and the preliminary investigation will be closed) to the Premerger Notification Unit/FTC Liaison Office by e-mailing the form to the ATR-Premerger MTS Forms mailbox. *See* Division Directive ATR 2810.1, "Matter Tracking System." The DAAG for Operations, the Criminal DAAG, and the Director of Criminal Enforcement will make a recommendation to the Assistant Attorney General. If approved by the Assistant Attorney General, letters of authority are issued for all attorneys who will participate in the grand jury investigation.

Staff should determine whether the district where the grand jury will sit requires the filing of letters of authority. If so, they should be filed under seal. If not, they should be maintained in the field office files. If attorneys are added to the original staff, the chief should notify the office of the Director of Criminal Enforcement and request additional letters of authority.

The investigation should be conducted by a grand jury in a judicial district where venue lies for the offense, such as a district from or to which price-fixed sales were made or where conspiratorial communications occurred. In determining the district in which to conduct the grand jury investigation, staff should consider (1) the degree of nexus between the location and the conduct under investigation; (2) the convenience for staff and potential witnesses, including the production and review of documents; (3) the availability of grand jury time (including the availability of antitrust-only versus "shared" grand juries, the frequency of meetings, and the duration of the grand juries' terms); (4) potential difficulties in conducting grand juries in particular jurisdictions; and (5) the judicial districts in which any resulting prosecution likely would be brought.

When seeking grand jury authority, staff should begin planning the grand jury investigation in much the same manner as planning the preliminary investigation. *See* Chapter III, Part C. Staff should establish an investigative plan which should be modified frequently as the investigation progresses. Staff should identify in its plan:

- Subjects of the investigation.
- Factual issues relevant to determining guilt, the validity of potential defenses, or the economic impact of the violation (for both trial and sentencing purposes).
- Potential fact witnesses, whether they should be subpoenaed or interviewed and whether they are candidates for immunity.
- Types of documentary evidence that may be relevant to factual issues.
- Potential sources of documentary evidence and whether to obtain such evidence voluntarily, by subpoena, or by search warrant.

- Opportunities for covert investigation, such as consensual monitoring or the use of search warrants.
- When appropriate, staff should give strong consideration to seeking the assistance of appropriate Government agents and utilizing them as members of staff.

2. Empanelling and Scheduling the Grand Jury

Among the first decisions staff must make after authority is granted is whether to request empanelment of a new grand jury or to use an existing one. Staff should attempt to estimate the number of sessions and the amount of time necessary to complete the investigation. When the investigation will likely take a considerable number of sessions and a substantial amount of grand jury time, it is best to begin a new 18-month grand jury that will be empanelled specifically for antitrust investigations. (Rule 6(g) of the Federal Rules of Criminal Procedure permits the court to extend the term of the grand jury up to an additional six months.) In that way, the Division can maintain better control over the scheduling of grand jury time and operate more efficiently. In some districts, the court is unlikely to empanel a new grand jury for the exclusive use of the Antitrust Division, and staff will share a grand jury with the U.S. Attorney's Office. In such districts, staff usually should attempt to use the most recently empanelled grand jury (*i.e.,* the grand jury with the greatest time left in its term). Staff generally should not seek to empanel a new grand jury when the Antitrust Division will be unable to utilize a significant portion of its available time. Underutilized grand juries may strain relations with the U.S. Attorney and court personnel.

Grand jury procedures can vary significantly in different jurisdictions. Staff should follow the procedures that have been established in the district in which the grand jury will sit. Each field office has a liaison with the U.S. Attorney's Offices in its district. When an investigation will be conducted in an unfamiliar district, staff should consult the designated U.S. Attorney liaison to discuss local practice and, if sharing a grand jury, to discuss potential scheduling conflicts. Staff should develop a good working relationship with the local U.S. Attorney's Office whenever an investigation will be conducted outside of a district in which a field office is located. Staff should inform the U.S. Attorney's Office, typically through its liaison, that the Division will be conducting the investigation. The U.S. Attorney liaison can assist in empanelling or scheduling the grand jury, familiarize staff with local procedures, and provide other advice and assistance. In some jurisdictions, staff will schedule the grand jury through the clerk of the court. In those jurisdictions, staff should develop a working relationship with the clerk's office.

3. Rule 6(e)(3)(B) Notices

Rule 6(e)(3)(B) of the Federal Rules of Criminal Procedure requires the attorneys for the Government to provide the court with the names of

people other than Government attorneys to whom grand jury materials have been disclosed (*e.g.*, economists, agents) and to certify that the attorneys have advised such persons of their obligation of secrecy. Secretaries, paralegals, and clerical staffs need not be listed as they may be considered the alter egos of the attorneys, economists, agents, and others whom they assist. Staff should consult with the local U.S. Attorney's Office and follow local practice in preparing this information for the court.

4. Issuing Grand Jury Subpoenas

During the course of its proceedings, the grand jury will issue subpoenas *duces tecum* and subpoenas *ad testificandum*. Subpoenas *duces tecum* require the submission of documentary materials to the grand jury. Subpoenas *ad testificandum* require individuals to appear before the grand jury to testify. The grand jury may also subpoena individuals to provide various types of exemplars, such as handwriting samples. Subpoena recipients typically receive significant lead time to comply with subpoenas, but in exceptional circumstances when there is a risk of flight or destruction or fabrication of evidence, subpoenas may require speedy compliance, usually within one day. Such "forthwith" subpoenas should be used rarely and will likely be subject to close judicial scrutiny. *See* United States Attorneys' Manual § 9-11.140.

a. Subpoenas *Duces Tecum*

Subpoenas *duces tecum* often are issued to collective entities, such as corporations and partnerships, for which the Fifth Amendment privilege against self-incrimination is not available. Thus, a custodian of documents for a collective entity cannot refuse to comply with a subpoena for records of that entity because the act of production might incriminate him or her. However, the Government cannot introduce into evidence the fact that a particular person complied with the subpoena for records of the collective entity. *Braswell v. United States*, 487 U.S. 99, 118 (1988).

Subpoenas *duces tecum* for documents may also be issued to individuals or sole proprietors, who are treated as individuals. Although the contents of voluntarily created, preexisting documents are not protected by the Fifth Amendment privilege, *In re Grand Jury Subpoena Duces Tecum* dated Oct. 29, 1992, 1 F.3d 87, 93 (2d Cir. 1993), an individual's act of producing such documents may be self-incriminating by implicitly conceding the existence of the documents, the individual's possession of the documents, or the authenticity of the documents. Before issuing a subpoena *duces tecum* to an individual, staff should consider whether the individual's act of producing the subpoenaed documents may have such testimonial significance, and whether alternative methods of proof are available. Staff may consider requesting authority to compel individuals to produce documents through an immunity order limited to the act of production. In such

cases, staff should examine the individual to the extent necessary to establish compliance with the subpoena, but care should be taken to limit inquiries solely to matters relevant to the act of production. *See* United States Attorneys' Manual § 9-23.250.

Efforts to obtain evidence located outside the United States present special considerations. Staff should consult with the Foreign Commerce Section to discuss possible methods of obtaining such evidence, including alternatives to subpoenas. Special requirements regarding notification of foreign governments are discussed below. *See* Chapter III, Part F.11.d. It is prudent to notify the Foreign Commerce Section any time an investigation involves a foreign witness, subject or target, foreign commerce, activity occurring outside the United States, or evidence located outside the United States. The policies and procedures for notifying foreign governments are constantly evolving. Close contact with the Foreign Commerce Section will help avoid any oversights.

The schedule of documents to be attached to a subpoena *duces tecum* should include those documents necessary to a full investigation of the conduct in question. Before being served, the subpoena schedule must be reviewed to ensure its completeness and to guard against burdensomeness or other grounds for possible motions to quash.

Staff should determine how the subpoena will be served, often by an FBI agent or other government agent. Staff and counsel may also agree to voluntary acceptance of service by counsel on behalf of the recipient. Usually, staff will arrange for service of subpoenas, but in some jurisdictions the U.S. Attorney's Office may control the process.

The subpoena return date should provide a sufficient period of time for service of the subpoena and a document search and production. The subpoena return date must be a day when the grand jury will be sitting within the district. Staff, on behalf of the grand jury, may permit the recipient to return documents directly to the field office rather than producing them before the assembled grand jury. Before permitting this option, staff should consider the benefit of requiring the document custodian to testify before the grand jury. Such testimony can provide important information regarding the scope of the search and production and may result in the identification of documents withheld on a questionable assertion of privilege.

Once the subpoena is issued, counsel for the recipient may claim the subpoena is overly burdensome, especially in connection with data stored on the company's computer systems. As such, counsel may request a deferral of certain categories of documents, sometimes threatening a motion to quash. Because schedules typically are drafted without knowledge of what documents exist and the form in which they are kept, staff should consider, when appropriate, requests for such deferrals. Staff may agree, for example, to accept representative samples or defer production of specific types of documents. If a reasonable accommodation cannot be reached, it is the policy and

practice of the Antitrust Division to defend its subpoenas vigorously against motions to quash.

Prior to engaging in negotiations, staff should ensure that counsel has reviewed the schedule thoroughly with the recipient and understands the recipient's ability to comply with each demand. In most cases, negotiations will result in a satisfactory resolution. Every deferral must be reduced to writing, preferably in a letter from staff to counsel making the request. Failure to do so may seriously compromise staff's ability to preserve the integrity of the subpoena and will make more difficult any subsequent attempt to pursue an obstruction case for withheld or destroyed documents. If litigation is necessary, staff should move to file all papers under seal and conduct the proceedings in chambers to prevent any breach of grand jury secrecy.

It is common to subpoena records from telephone companies and financial institutions. Telephone companies need not notify a subscriber whose records are subpoenaed. To prevent premature disclosure that an investigation exists, staff should include with the subpoena a certification that the subpoena has been issued in connection with a criminal investigation, requesting that the existence of the subpoena not be disclosed to the customer. Under certain circumstances, staff may obtain a court order preventing disclosure. Subpoenas to financial institutions seeking individual account information are governed by the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-22. The Act requires that all such subpoenaed records be returned and actually presented to the grand jury and provides for reimbursement to the institution for the costs incurred in responding to the subpoena. Banks typically will comply with a letter requesting nondisclosure of the subpoena for a set period of time, which may be extended by a subsequent letter. Staff may obtain a court order prohibiting disclosure of the subpoena under certain circumstances.

The Division's standard document subpoena requires companies to produce all electronically stored data in its possession that is responsive to the subpoena. The term "document" is defined in the schedule to the subpoena to include all information stored on a company's computer systems. The subpoena also contains a lengthy instruction describing what steps the company must take to preserve all potentially responsive electronic data in its possession. That instruction describes what types of data must be preserved (*e.g.,* e-mails) and how that data should be preserved in various locations on the company's computer systems (*e.g.,* servers). Finally, the subpoena requires that all electronic data must be produced in an electronic format and that the company must contact staff to determine whether the company's proposed electronic format is compatible with the Division's equipment and resources. Production of electronic data in a paper format should never be accepted.

b. Subpoenas *Ad Testificandum*

Testimony before the grand jury should be scheduled to utilize the grand jury efficiently. When issuing subpoenas *ad testificandum*, staff should attempt to schedule sufficient witnesses for a full session and should provide adequate lead time to minimize last minute cancellations. Subpoenas usually will be served by a U.S. Marshal or an agent or may be accepted voluntarily by counsel on behalf of the recipient. Service by agent may provide an opportunity to interview the witness prior to the witness's grand jury appearance and often is quicker than service by U.S. Marshal.

The subpoena *ad testificandum* should include the following attached statement of the witness's rights and obligations in appearing before the grand jury, unless circumstances render such advice clearly superfluous (*see* United States Attorneys' Manual § 9-11.151):

Advice of Rights

- The Grand Jury is conducting an investigation of possible violations of Federal criminal laws involving antitrust offenses under the Sherman Act, 15 U.S.C. § 1.
- (State here the general subject matter of the inquiry (*e.g.*, conspiring to fix prices of widgets in violation of 15 U.S.C. § 1).)
- You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.
- Anything that you do say may be used against you by the Grand Jury or in a subsequent legal proceeding.
- If you have retained counsel, the Grand Jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.

The subpoena should also have as an attachment the procedures a witness must follow to receive reimbursement for travel expenses and a witness fee. This is often handled by the Victim-Witness coordinator for the field office.

In addition to the notification given to an individual when subpoenaed, the witness should be made aware of the following at the time of the witness's appearance before the grand jury:

- The identity of the Government attorneys and the presence of the grand jurors and the court reporter.
- The nature of the inquiry (*e.g.,* possible price fixing for the sale of widgets).
- The witness's status as a target, if that is the case. (Staffs should be aware of the Department's position on subpoenaing "subjects" or "targets" of an investigation, *see* United States Attorneys' Manual §§ 9-11.150 to .160, as well as the Department's position on

requests by subjects and targets to testify before the grand jury, *see id.* § 9-11.152.)

- The witness's Fifth Amendment right to refuse to answer any question if a truthful answer would tend to incriminate him or her.
- That anything the witness says may be used against the witness in any criminal proceeding.
- That the witness will be afforded a reasonable opportunity to leave the room to consult with counsel.
- That the grand jury proceedings are secret. While there are exceptions pursuant to statute, such as subsequent trials, no one other than the witness may disclose publicly what has occurred in the grand jury. The witness may disclose what has occurred in the grand jury to anyone if he or she wishes, but is not required to disclose such information to anyone.
- If the witness has been immunized, that the witness understands the effect of the immunity order and that the witness's testimony could still be used in a prosecution for perjury or making a false statement to the grand jury.

The witness should be asked to acknowledge his or her understanding of each of the identified rights and obligations.

c. Subpoenas for Exemplars

In addition to issuing subpoenas for documents or testimony, the grand jury may issue subpoenas requiring individuals to provide various types of exemplars. Most typical in antitrust investigations are subpoenas to provide samples of handwriting for use in establishing authorship or authentication of documentary evidence. Prior to issuing the subpoena, staff must arrange with an investigative agent to take the exemplar. When the witness appears before the grand jury, the foreperson will inform the witness that a particular person has been designated the grand jury's agent to take the exemplar and will direct the witness to provide the exemplar at a particular time and place. Usually, upon receipt of the subpoena, the recipient will agree to provide the exemplar at a mutually convenient time and place without appearing before the grand jury.

5. Search Warrants

When appropriate, staff should consider using search warrants prior to or in addition to issuing subpoenas *duces tecum*. If probable cause does not exist at the beginning of an investigation, staff should consider the possibility of developing probable cause before issuing compulsory process, making voluntary requests, conducting interviews, or taking other steps that would make the investigation public.

Search warrants can be an effective means for gathering incriminating evidence. The use of search warrants, as opposed to subpoenas *duces tecum,* minimizes the opportunity for document destruction and concealment, prevents the failure to produce responsive documents either deliberately or through inadvertence, and often spurs a race for leniency. During the course of an investigation, staff may learn that material documents responsive to a subpoena *duces tecum* have been withheld. If staff believes documents have been withheld intentionally rather than being inadvertently overlooked, staff should consider applying for a search warrant instead of providing the recipient a second chance to produce the documents in response to the original or a new subpoena. The requisite probable cause underlying the application may be based on the substantive crime under investigation or, if sufficient evidence exists, on obstruction of justice due to the withholding of subpoenaed materials.

Search warrants may be applied for when there is probable cause to believe that a crime has been committed, that documents or other items evidencing the crime exist, and that such items to be seized are at the premises to be searched. The elements of probable cause are the same for an antitrust crime as for other crimes, both as a matter of law and Division policy. It is not necessary to have probable cause to believe that evidence of the crime may be destroyed or withheld if not seized by search warrant.

The warrant must describe with particularity the property to be seized; state that the property is evidence of a specified criminal offense; provide an exact description of the location to be searched; note the period of time within which the search is to be executed (the period may be no greater than within 14 days pursuant to Fed. R. Crim. P. 41(e)(2)(A)); and note whether the search will be conducted in the daytime (which is defined in Fed. R. Crim. P. 41(a)(2)(B) as 6:00 a.m. to 10:00 p.m.) or whether it may be executed at any time. The Division will rarely seek permission to conduct a nighttime search, which must be based on a showing of good cause pursuant to Fed. R. Crim. P. 41(e)(2)(A)(ii). The degree of specificity with which the warrant must describe the documents to be seized and the location to be searched may vary depending on the circumstances. When seeking business records, it is usually sufficient that the warrant describes records of a type usually maintained by the business at the business location.

The factual basis establishing the probable cause for the search will be set forth in the search warrant affidavit. The affidavit must include sufficient facts to establish probable cause both that the crime was committed and that evidence of the crime is at the search location. Supporting evidence of probable cause must not be “stale” (*i.e.,* too old), but there is no set time period after which staleness is presumed. The affidavit may be based entirely on hearsay, as long as the source of the evidence is reliable.

Staff must submit the search warrant affidavit and other documents in the application package to the field office chief responsible for reviewing and authorizing staff's application for the search warrant. When seeking a search warrant, staff must obtain the assistance of an investigative agency, usually the FBI.

The application for the search warrant will be made to a magistrate in the judicial district where the property is located. The affidavit should be filed under seal. Staff should consult with the local U.S. Attorney's Office concerning local practices and procedures, including whether the affidavit is automatically filed under seal, or if a motion to file under seal must be made at the time of application.

Once approved, the search is conducted by a team of agents, who may also seek to interview individuals on site. No staff attorney should be present during the search, but an attorney should be available by telephone for consultation with the agents. Upon the conclusion of the search, the agents should serve a subpoena *duces tecum* on the company requiring the production of documents covered by the search warrant and any additional documents needed by the grand jury. The subpoena should include documents subject to the search warrant in order to obtain documents maintained at other locations or that were not seized at the search location.

If staff believes that privileged documents may have been seized during the search, or if counsel for the subject claims that to be the case, procedures should be followed to ensure that staff and the case agent are not tainted by reading privileged documents. For detailed information and guidance on searching computers, staffs should consult the Criminal Division's *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*.

6. Procedures for a Grand Jury Session

This section provides suggested procedures for the preparation and conduct of a grand jury session. As indicated above, the Division generally follows the procedures used by the U.S. Attorney in a given district. Staff should consult with the local U.S. Attorney liaison when unfamiliar with local practice.

In setting up a grand jury session, staff should:

- Inform the clerk's office or U.S. Attorney's Office of the timing of the session at least one month in advance of the session, so that room arrangements may be made and the jurors may be notified of the schedule. If the Division is sharing a grand jury with the U.S. Attorney's Office or another section or field office, arrangements should be made as early as practicable to ensure availability of grand jury time. Staffs should be aware that in some districts, staff is responsible for notifying the grand jurors of a scheduled session;

in other districts, the U.S. Attorney's Office or the clerk will issue the notices.

- Arrange to obtain a court reporter at the time the session is scheduled and the jurors are notified. *See* Division Directive ATR 2570, "Payment of Litigation-Related Expenses." In some jurisdictions, arrangements will be made by the local U.S. Attorney's Office.

- If subpoena service will be made by the U.S. Marshal, send subpoenas to the U.S. Marshal in the relevant district with a cover letter indicating the date of the testimony, the date by which service is required, and other relevant information. Because marshals in large metropolitan areas have a number of duties and may take as long as two weeks to serve subpoenas (and occasionally longer), staff should provide as much lead time as possible for service. Counsel for a prospective witness will often insist that the witness be immunized. When staff anticipates compelling a witness's testimony, they must allow sufficient time after service to negotiate with counsel and receive a proffer of the witness's testimony, if appropriate.

  Except when few documents are sought, compliance with subpoenas *duces tecum* requires more lead time than testimonial subpoenas. The subpoena return date should be selected to allow sufficient time after service for document search and retrieval. The time needed for compliance, however, is often subject to negotiation and may be extended if necessary.

- Prepare immunity clearance requests for witnesses who may claim their Fifth Amendment privilege at the session. The immunity clearance papers (*see* Chapter III, Part F.7) must be received by the Office of Operations at least two weeks before the date on which staff will need the clearance and possession of the immunity authorization letter. The date that staff needs the letter is the date that the U.S. Attorney will review the motion papers, or the date the judge will be asked to sign the order.

- Immediately before the session begins, determine whether the stenographer has been sworn before the grand jury. If not, check that a copy of the stenographer's oath is available to be administered by the foreperson prior to the stenographer recording any statement or testimony.

7. Requests for Statutory Immunity

Federal Rules of Evidence

FEDERAL RULES OF EVIDENCE

Selected Rules

Rule 101. Scope; Definitions

(a) *Scope*. These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these rules:
  (1) "civil case" means a civil action or proceeding;
  (2) "criminal case" includes a criminal proceeding;
  (3) "public office" includes a public agency;
  (4) "record" includes a memorandum, report, or data compilation;
  (5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and
  (6) a reference to any kind of written material or any other medium includes electronically stored information.

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise**:**

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 601. Competency to Testify in General

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

The following definitions apply under this article:

(a) *Statement*. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
(b) *Declarant*. "Declarant" means the person who made the statement.
(c) *Hearsay*. "Hearsay" means a statement that:
    (1) the declarant does not make while testifying at the current trial or hearing; and
    (2) a party offers in evidence to prove the truth of the matter asserted in the statement.
(d) *Statements That Are Not Hearsay*. A statement that meets the following conditions is not hearsay:
    (1) *A Declarant-Witness's Prior Statement*. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
        (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
        (B) is consistent with the declarant's testimony and is offered:
            (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
            (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
        (C) identifies a person as someone the declarant perceived earlier.
    (2) *An Opposing Party's Statement*. The statement is offered against an opposing party and:
        (A) was made by the party in an individual or representative capacity;
        (B) is one the party manifested that it adopted or believed to be true;
        (C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) *Criteria for Being Unavailable*. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) *The Exceptions*. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) – (2) *Omitted*

(3) *Statement Against Interest*. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) – (6) *Omitted*

Rule 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.